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(A T R E A T I S E)

ON THE

Law and Practice

RELATING TO

(VENDORS AND PURCHASERS)

OF

REAL ESTATE.

By J. HENRY DART,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW, ONE OF THE SIX CONVEYANCING COUNSELLORS OF THE
HIGH COURT OF CHANCERY.

THE FIFTH EDITION,

BY

THE AUTHOR AND WILLIAM BARBER,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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PREFACE

TO THE FIFTH EDITION.

THE Fourth Edition of the present work was published in December, 1870, and has during the greater part of the intervening period been out of print.

The delay which has attended the appearance of the present edition has enabled the author and his former co-Editor (whose services he has again been fortunate in securing) to embody in the work a large mass of additional—and, in some of the chapters, of substituted—matter, containing the result of five years' decisions, and of the very important enactments which, during that period, have received the sanction of the Legislature.

The authorities are, by the aid of the *Addenda*, brought down to the end of the Long Vacation, 1875.

LINCOLN'S INN,
December, 1875.

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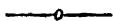
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ADDENDA AND ERRATA.



- P. 5, n. (d). See *Essex v. Daniell*, L. R. 10 C. P. 543.
- P. 19, n. (g). And see and consider *In re Muleay*, L. R. 20 Eq. 186.
- P. 63, n. (i). See, too, *Want v. Stallibrass*, L. R. 8 Exch. 175.
- P. 70, n. (d). For "19 & 20 Vict. c. 126," read "19 & 20 Vict. c. 120."
- P. 102, third marginal note. For "purchaser," read "vendor."
- P. 126, n. (c). See, too, *Want v. Stallibrass*, L. R. 8 Exch. 175, 179.
- P. 160, n. (n). And see *Powell v. Powell*, L. R. 19 Eq. 422, where the sale, though under the direction of the Court, was invalid by reason of its having been made before the filing and approval of the certificate in answer to the preliminary inquiries.
- P. 168. *Hodgkinson v. Crowe*, now reported in L. R. 19 Eq. 591.
- P. 169, n. (d). As to what are usual covenants in a mining lease, see *Hodgkinson v. Crowe*, *ubi supra*.
- P. 200, n. (b), and p. 205, n. (u). But see *Angell v. Duke*, L. R. 10 Q. B. 174.
- P. 216, n. (o). And see *Chasmore v. Turner*, 10 Q. B. 500.
- P. 218, n. (d). And see *Cummins v. Scott*, L. R. 20 Eq. 11; but see *Beer v. London and Paris Hotel Company*, L. R. 20 Eq. 412, and *quere*.
- P. 219, n. (y). For "*Hayward v. Cope*, 22 Beav.," read "*Haywood v. Cope*, 25 Beav."
- P. 237, line 13. For "is exempt," read "was exempt."
- P. 278, n. (u). And see *Le Marchant v. Commissioners of Inland Revenue*, L. R. 10 C. P. 292.
- P. 282, line 5. For "cost," read "covenant."
- " n. (c). For "33 & 34 Vict.," read "37 & 38 Vict."
- P. 359, n. (l). *Aynsley v. Glover*, affirmed on appeal, L. R. 10 Ch. Ap. 283.
- P. 364, n. (u). As to the diversion of water by a waterworks company only entitling a riparian owner lower down the stream to compensation, and not to call on the company to buy his portion of the stream, see *Bush v. Trowbridge Waterworks Company*, L. R. 10 Ch. Ap. 459.
- P. 364, n. (a). *Holker v. Porritt*, reported on appeal, L. R. 10 Exch. 59.
- P. 370, n. (s). And see *Aspden v. Seldon*, L. R. 10 Ch. Ap. 394.
- P. 386, n. (c). And see *Chasmore v. Turner*, L. R. 10 Q. B. 500.
- P. 397, n. (e). For "*Moore v. Bannister*," read "*Moodie v. Bannister*."
- P. 420, second marginal note. For "presumption," read "preemptio."

- P. 422. See now the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 5, subject 7 which assimilates the rules of Law and Equity as to time being essential, and *vide infra*, p. 974.
- P. 422, (r). *Phillips v. Miller* reversed on appeal, L. R. 10 C. P.
- P. 422, (z). For "*Bultel*," read "*Bultel*."
- P. 502, n. (g). The seventh section of the V. and P. Act, 1874, is now repealed by sect. 129 of 38 & 39 Vict. c. 87.
- P. 512, n. (c). This section has since been repealed and re-enacted in a different form. See sect. 48 of 38 & 39 Vict. c. 87.
- P. 539, n. (y). And compare *Kay v. Orley*, L. R. 10 Q. B. 369.
- P. 543, n. (y). *Lacey v. Hill*, in which case *Rosland v. Cuthbertson* was dissented from, is now reported in L. R. 19 Eq. 346.
- P. 575, n. (u). And see *re Matilda Edsall*, L. R. 10 C. P. 472.
- P. 602, n. (a). And see *Carlyon v. Truscott*, L. R. 20 Eq. 348.
- P. 622, n. (b). See now *Lacey v. Hill*, L. R. 19 Eq. 346.
- P. 655, n. (d). And see *Essex v. Daniell*, L. R. 10 C. P. 538.
- P. 663, n. (z). And see *re Bethlem Hospital*, L. R. 19 Eq. 457.
- P. 695, n. (c). For "33 & 34 Vict. c. 15," read "33 & 34 Vict. c. 97, sect. 15."
- P. 702, second marginal note. For "apportionment," read "apportionment."
- P. 720, n. (h). See, however, *Ex parte, Governors of St. Bartholomew's Hospital*, L. R. 20 Eq. 369, where the costs were apportioned rateably.
- P. 724, n. (i). For "*Catten*," read "*Catlin*."
- P. 728, line 22. For "41 Geo. III.," read "41 Geo. III."
- P. 768, n. (m). See *Harrison v. Good*, L. R. 11 Eq. 338.
- P. 813. Whether the late Apportionment Act applies as between Vendor and Purchaser, is a moot point which has not yet been judicially determined.
- P. 835, n. (L). And see *Waddy v. Gray*, L. R. 20 Eq. 238.
- P. 836. The 7th section of the V. and P. Act, 1874, is now repealed, *vide supra* and *infra*, p. 1170.
- P. 932. As to what is a putting oneself in *loco parentis*, see *Fooks v. Pascoe*, L. R. 10 Ch. Ap. 343, 350.
- P. 962, n. (a). But see *Ex parte Barrell*, L. R. 10 Ch. Ap. 512, and *infra*, p. 1227.
- P. 966, n. (e). Compare *Soliman v. Glover*, L. R. 20 Eq. 444.
- P. 971, n. (z), and 974, n. (a). And see *Hickman v. Haynes*, L. R. 10 C. P. 598.
- P. 1004, n. (s). And see *Warnford v. Heye*, L. R. 20 Eq. 321.
- P. 1024, n. (q). For "*Wells*" read "*Wills*."
- P. 1227, n. (p). And see *Ex parte Barrell*, L. R. 10 Ch. Ap. 512.



. A TREATISE,

&c.

CHAPTER I.

Chapter I.

AS TO RESTRICTIONS ON THE GENERAL CAPACITY TO BUY OR SELL REAL ESTATE.

- 1. *Who are generally* } *incompetent to sell.*
- 2. *Who are relatively* }
- 3. *Who are generally* } *incompetent to purchase.*
- 4. *Who are relatively* }

THE questions who may sell, and who may buy, real estate, may be conveniently discussed, by assuming the existence of a general capacity to enter into the relation of vendor or purchaser ; and by then treating of the exceptions from the general rule.

Incapacities to sell or buy may be considered as being of two descriptions : 1st, such as depend on some circumstance personal to the proposed vendor or purchaser, and affecting his general capacity to buy or sell any real estate whatsoever ; and, 2ndly, such as depend on the relation in which he stands to the particular property about to be sold or bought ; or to the party with whom he intends to deal.

Incapacities
to sell or buy
are

general
or relative:

(1.) *Who are generally incompetent to sell.*

Section 1.

A proposed vendor, although having a good title to, and being the absolute owner of property, and standing in no

Who are
generally
incompetent
to sell.

RESTRICTIONS ON GENERAL CAPACITY

Infants. 11
 fiduciary relation towards the proposed purchaser, may yet be under some personal incapacity, which may prevent a sale; that is to say, he may be, 1st, *An infant*; if so, he can, as a general rule, execute no conveyance which will bind, either for himself when he comes of age, or his heirs in the event of his dying, either under age, or of full age, but without having confirmed the transaction:—supposing it to be capable of confirmation (a).

Estates of, cannot generally be sold by Court.

Nor has a Court of Equity any authority to sell the real estate of an infant, under the mere notion that a sale will be beneficial (b). In some cases, however, where an infant has been entitled to an undivided share of realty of small value, the shares in which have been minute or numerous, a sale instead of a partition has been decreed, as being more advantageous to the infant; but, in order to create the jurisdiction, the infant's costs already incurred in the suit have been first declared to be a charge on his share (c). and under a recent statute (d), the Court has power to order a sale, instead of a partition, notwithstanding the disability of any of the parties

May convey under special statutes.

And, by statute, in particular cases, infants holding land in trust, or subject to the debts of their ancestor or testator, are enabled to convey, under the authority of the Court of Chancery (e); so, too, by the Infants' Settlement Act (f), an

(a) 4 Bac. Abr. 360, *et seq.* Any deed which takes effect by delivery, is, if executed by an infant, voidable only; but letters of attorney, and deeds which delegate a mere power, and convey no interest, are absolutely void. *Zouch v. Parsons*, 3 Burr. 1794; *Anon v. Handcock*, 17 Ves. 383; *Allen v. Allen*, 2 Dru. & W. 307.

(b) *Calest v. Godfrey*, 9 Beav. 97; and see *Brookfield v. Bradley*, Jac. 634; *Wood v. Patteson*, 10 Beav. 541; *Pidd v. Moore*, 19 Beav. 176; 7 De G. M. & G. 491. As to sale under special circumstances, see *Garnstone v. Gaunt*,

1 Coll. 577; *infra*, Ch. XXI. s. 1. As to mortgage of an infant's estate under special circumstances, see *Prith v. Cameron*, L. R. 12 Eq. 169; but see *Hilbert v. Cook*, 1 S. & S. 552. As to the power of the Court to order a sale of an infant's reversionary interest in personal estate, see *Nunn v. Hancock*, L. R. 6 Ch. Ap. 850.

(c) *Thackeray v. Parker*, 1 N. R. 567; *Davis v. Turvey*, 32 Beav. 554; *Hubbard v. Hubbard*, 2 H. & M. 38.

(d) 81 & 82 Vict. c. 49.

(e) *Vide infra*, Chs. XIII. and XXI.

(f) 18 & 19 Vict. c. 43.

infant may, with the sanction of the Court, make a valid and binding settlement of his or her real or personal estate in contemplation of marriage; and, in various special cases, infants, or their guardians, are enabled, by statute, to sell and convey land for purposes connected with religion (g), charity (h), instruction (i), literature, science, and the fine arts (k), or works of a public nature (l).

So, an infant can convey under a power simply collateral (m), but he cannot be empowered, at least as against himself, to contract for the sale of land, or to do any other act which requires an exercise of discretion: and if he enter into a contract for the sale of lands, he cannot, during infancy, enforce it; as otherwise there would be no mutuality of remedy (n).

May exercise collateral powers.

But, by the custom of gavelkind, an heir at the age of fifteen, may, for valuable consideration, sell, and convey for an estate in possession, lands which he took by descent; the conveyance being by feoffment, and livery of seisin being delivered by him in person (o).

And may sell under custom of gavelkind.

An infant, however, has no privilege to commit a fraud (p): if, therefore, he were to sell and convey, asserting that he had

Fraudulent sale by, relieved

(g) See, for a list of the Church Building Acts, the preamble to 17 & 18 Vict. c. 14. The powers of the Church Building Commissioners are now transferred to the Ecclesiastical Commissioners, 19 & 20 Vict. c. 55. As to sites for churchyards, see 30 & 31 Vict. c. 133. As to sites for churches, &c., ministers' residences, and burial places, see 36 & 37 Vict. c. 50, under which an infant, with the consent of his guardian, is empowered to convey.

(h) See 16 & 17 Vict. c. 137, s. 27; 18 & 19 Vict. c. 124, s. 41; 23 & 24 Vict. c. 136; 24 & 25 Vict. c. 9.

(i) See 4 & 5 Vict. c. 38; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; 15 &

16 Vict. c. 49; and 6 & 7 Will. IV. c. 90.

(k) 17 & 18 Vict. c. 112.

(l) See 23 & 24 Vict. c. 112.

(m) Sug. Pow. 177, 8th edit.

(n) *Flight v. Bolland*, 4 Russ. 298.

(o) 4 Bac. Abr. pp. 49, 50. *Quære*, whether the custom is not more comprehensive? see *Consuetudines Kentiarum*, 165; it extends to females, *ib.*, and is not affected by the 8 & 9 Vict. c. 106, s. 3.

(p) Chambers on Infancy, 412; and see *Overton v. Banister*, 3 Ha. 503; *Campbell v. Ingleby*, 21 Beav. 573; and at Law, *Bristow v. Eastman*, 1 Esp. 172.

Chap. I.
Book I.

against, in
Equity:
semble.

If there be
actual mis-
representa-
tion.

attained his majority, the purchaser, it is conceived, would, if he had acquired the legal estate, be in Equity, entitled to its protection (q): so, if the infant, having the legal estate, were to proceed at Law to recover the property, Equity would restrain the action, except upon the terms of his refunding the purchase-money; for instance, where an infant received a premium for a lease of his lands, upon his false assertion that the lessor was his guardian, Lord King decreed a return of the premium with interest (r). But, in the absence of any false assertion by the infant, relief in Equity will not be granted against him upon the ground that the other contracting party believed him to be of full age (s). The mere fact of an infant entering into a transaction which must necessarily be invalid unless entered into by an adult, is not such a fraud as entitles the other party to relief (t). There must be something equivalent to actual misrepresentation on the part of the infant: and where the false statement is made to a person who knows it to be false, there is no fraud committed which will take away the privilege of infancy. While on the one hand it is a legal indulgence which is not to be used by the infant for the purposes of fraud, so on the other hand it is not to be infringed upon by persons who, knowing of the infancy, must be taken also to know the legal consequences which attach to it (u). At Law, even his fraudulent representation that he is of full age does not render him liable to an action by the party who has been thereby induced to contract with him (x). But in Bankruptcy, where an infant obtained a loan on a representation, which he knew to be false, that he was of age, proof for the loan was admitted (y).

Could not sell
annuity or
rent-charge.

By the 53 Geo. III. c. 141, s. 8, all contracts for the sale of any annuity or rent-charge by an infant were declared

(q) See the judgment in *Hannah v. Johnson*, 9 W. R. 729, 733; *quære*, whether affected by Sect. 7 of 37 & 38 Vict. c. 78.

(r) *Johnson v. Nicholas*, 1 De G. & S. 118.

(s) *Stikeman v. Dawson*, 1 De G. & S. 40.

(t) *Stikeman v. Dawson*, 1 De G. &

S. 90; *Wright v. Snowe*, 2 De G. & S. 321.

(u) *Nelson v. Stocker*, 4 De G. & Jo. 458; and see *Inman v. Inman*, L. R. 15 Eq. 260.

(x) *Johnson v. Pye*, 1 Sid. 258; *Liverpool Association v. Fairhurst*, 9 Exch. 422.

(y) *Re King*, 3 De G. & Jo. 63.

utterly void, notwithstanding any attempted confirmation after majority; and the intending purchaser was made guilty of a misdemeanor: but this Act is now repealed by the 47 & 48 Vict. c. 90, and before the repealing Act, the joint and several contract of an infant and an adult for sale of an annuity to a third party, was valid as against the adult (z).

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By the Infants' Relief Act, 1874 (a), no action can now be brought "upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such ratification after full age." If this enactment is to be literally construed, no action can now be brought against a person who, having when of full age ratified, refuses to perform, a contract made by him during infancy for the sale or purchase of real estate; though by a suit in Equity, specific performance may be enforced against him. The language, however, of the first section seems to favour the supposition that the Act was only intended to apply to a contract for the repayment of money lent, or for the payment of the value of goods supplied to an infant, and to a subsequent ratification of such a contract; and it may be hoped that it will be so interpreted by the Courts.

Infants' Relief
Act, 1874.

Or, 2ndly, The proposed vendor may be a lunatic or idiot: in which case, according to the early authorities, his conveyance may be set aside by his committee during his life, or by heirs after his death: yet he himself, though he recover his senses, is, it has been said, unable to avoid it (b); at least if made by feoffment, with livery of seisin delivered by him in person (c): it has, however, been held, that a bargain and sale, lease and release, or other innocent conveyance by a lunatic, is absolutely void (d); and the 8 & 9 Vict. c. 106, s. 4, which deprives a feoffment of its tortious operation,

Lunatics,
sales by, how
far void or
voidable.

(z) *Haw v. Ogle*, 4 Taunt. 10; *Gillow v. Lillie*, 1 Sc. 597.

(c) *Thompson v. Leach*, Comb. 468; *Beverley's case*, *ubi supra*.

(a) 37 & 38 Vict. c. 62, s. 2.

(d) Sug. Pow. 605, 8th edit.

(b) *Beverley's case*, 4 Rep. 123 b.

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renders such a conveyance by a lunatic equally inoperative. But the rule against a party being allowed to stultify himself, would not prevail in Equity (e), nor, according to the modern authorities, at Law (f), in favour of a purchaser who had knowingly dealt with an incompetent vendor: and it is now decided that the lunatic himself, as well as his representatives, may establish his lunacy in order to impeach a deed which he has executed (g). On the other hand, it has been held, at Law, that where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and *bonâ fide*, and is executed and completed, and the property forming its subject-matter cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or his representatives (h): and, in Equity, the result of the authorities seems to be, that sale-transactions with a person apparently sane, though afterwards found to be of unsound mind, will not be set aside against those who have dealt with him in the *bonâ fide* belief that he was of competent understanding (i). Evidence of the lunatic's conduct as well before as after his signing the contract is admissible, for the purpose of fixing the other contracting party with notice of the insanity (k); but evidence of general reputation has been held inadmissible to prove the fact of lunacy, or to fix the other contracting party with knowledge of it (l).

(e) *Shelf. on Lun.* 350.

(f) *Molton v. Camroux*, 2 Exch. 487, 501; *S. C.*, in error, 4 Exch. 17, and cases cited; *Beavan v. M'Donnell*, 10 Exch. 184.

(g) *Molton v. Camroux*, 2 Exch. 487, 501.

(h) *Molton v. Camroux*, *suprà*; *Beavan v. M'Donnell*, 9 Exch. 309.

(i) *Elliott v. Ince*, 7 De G. M. & G. 488; and see also *Niell v. Morley*, 3 Ves. 478; *Williams v. Wentworth*, 5 Beav. 325; *Selby v. Jackson*, 6 Beav. 123; *affd.* 204; *Price v. Berrington*, 3 Mac. & G. 486, 497, 498; *Campbell v. Hooper*, 3 Sm. & G. 153. In *Frost v. Beavan*, 17 Jur. 369, the Court on

a purchase by a lunatic rescinded the contract, and ordered the deposit to be returned (the vendor's expenses being first deducted); but this, as the author is informed, was by arrangement, it being understood that the vendor sold with notice of the insanity. And as to relief against a purchaser on the ground of the vendor's insanity, see *Price v. Berrington*, *suprà*. As to partial insanity and lucid intervals, see *Selby v. Jackson*, *suprà*; *Oreagh v. Blood*, 2 J. & L. 509; 1 Keen, 620; and 2 Beav. 115.

(k) *Beavan v. M'Donnell*, 10 Exch. 184.

(l) *Greenslade v. Dare*, 20 Beav. 284.

And if a lunatic levied a fine or suffered a recovery in person, the conveyance was good (*m*): but this rule did not apply to voluntary assurances, *e. g.*, a disentailing assurance or power of attorney executed by a lunatic not *ex contractu* (*n*): and of course, no similar effect would now result from his executing an assurance under the 3 & 4 Will. IV. c. 74.

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Fine or recovery.

Until the statute 1 Will. IV. c. 65, sec. 27, there was no mode of obtaining a conveyance from a vendor who became lunatic after entering into the contract. This statute was superseded by the Lunacy Regulation Act (*o*), which contains ample provisions enabling the committee, under an order of the Chancellor, to convey lands in performance of the lunatic's contracts (*p*), and to make sale, partition, or exchange of his undivided share in any land (*q*), and to sell for building purposes any land of or to which he is seised or entitled in fee simple (*r*). It seems doubtful whether this last provision will include land over which the lunatic has an absolute power of appointment, or land conveyed to him to uses to bar dower; but in the latter case the dower trustee might of course release his estate. By the Lands Clauses Consolidation Act, 1845 (*s*), committees of lunatics are empowered to sell and convey; and by the Leases and Sales of Settled Estates Act (*t*), they may, by the special direction of the Court, exercise the powers given by that Act for the leasing and sale of settled lands. Committees must be careful not

Statutory powers of Committees.

Under Lunacy Regulation Acts.

Under Leases and Sales of Settled Estates Act.

(*m*) See Shelf. on Lun., p. 316, *et seq.*; *Murley v. Sherren*, 8 Ad. & E. 754; but as to the deed making the tenant to the praecipe, and the declaration of uses (if any) being affected by the lunacy, see 3 Atk. 313; *Elliott v. Ince*, 7 De G. M. & G. 486.

(*n*) *Elliott v. Ince*, 7 De G. M. & G. 486.

(*o*) 16 & 17 Vict. c. 70; see too 25 & 26 Vict. c. 86, s. 1; and General Orders in Lunacy of 7 Nov. 1853.

(*p*) Sect. 122.

(*q*) Sect. 124.

(*r*) Sect. 125.

(*s*) 8 & 9 Vict. c. 18, s. 7. Where a vendor is a lunatic, and no committee has been appointed, the purchase cannot safely be completed without the intervention of a Court of Equity, *Midland R. Co. v. Oswin*, 3 R. Ca., 497; 1 Coll. 74.

(*t*) 19 & 20 Vict. c. 120; and as to mode of proceeding under this Act, see *Morgan's Chancery Acts and Orders*, p. 599.

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to exercise their statutory powers without the consent of the Chancellor (u).

As to acknow-
ledgment
by lunatic
feme covert.

It is now decided that the Lord Chancellor, in directing a sale of the real estate of a lunatic married woman, under the Lunacy Regulation Act, 1862 (x), has no power to dispense with her acknowledgment of the deed, and can only vest in the purchaser an equitable fee binding on herself and her heir (y).

Married
women :—
Estates of,
how conveyed.

Or, 3rdly, The proposed vendor may be a married woman : in which case she may, with her husband, convey her freehold estates under the 3 & 4 Will. IV. c. 74; but any other conveyance by her is, at Common Law, absolutely void (z). And where a ward of Court married without consent, and, after attaining twenty-one executed, by the direction of the Court, a settlement of real estate to which she was equitably entitled, but did not acknowledge the deed, it was held that her heir was not bound (a).

Customary
power of
alienation.

Before the Fines and Recoveries Abolition Act, in many places a married woman had a customary power, with her husband's concurrence, to dispose of land by deed acknowledged before the local authorities (b), and this power seems to be unaffected by the Act (c). Her copyhold estates will pass by her surrender, with her husband's concurrence; or, if her interest be merely equitable, either by such a surrender or by deed acknowledged under the Act; and her legal terms for years, as well reversionary (d) as in possession, will pass by the sole assignment of her husband (e);

As to copy-
holds.

(u) *In re Wade*, 1 H. & Tw. 202. A bill cannot be filed by a next friend on behalf of a person of unsound mind, not so found by inquisition for the purpose of dealing with his real estate; see *Halfhide v. Robinson*, L. R. 9 Ch. 373.

(x) 25 & 26 Vict. c. 36 s. 13.

(y) *Re Stables*, 10 Jur. N. S. 245; see also 16 & 17 Vict. c. 70, s. 116.

(z) Burton's Comp. pl. 206; see judgment in *Zouch v. Parsons*, 3 Burr. 1805.

(a) *Field v. Moore*, 7 De G. M. & G. 691.

(b) See 1 Rep. H. & W. 140.

(c) See sect. 73.

(d) *Duberley v. Day*, 16 Beav. 33.

(e) Burton's Comp. pl. 895; *Hill v. Edmonds*, 5 De G. & S. 603.

though whether they will be bound by his contract, in the event of his death in her lifetime and before conveyance, seems to be doubtful (*f*); and in order that a reversionary term may pass by his assignment, it must be such an one as could possibly vest in possession during the coverture (*g*). As respects her equitable terms for years, in order to perfect the title, she must join in and acknowledge the assignment; for although the husband's sole assignment will bind her right by survivorship (*h*), it will not displace her equity to a settlement (*i*).

It is now settled that under the 77th sect. of the 3 and 4 Will. IV. c. 74, a married woman, with her husband's concurrence, is capable of contracting in Equity, if not at Law, so as to bind her real estate, though possibly not so as to render herself personally liable for breach of contract (*k*).

Their power to contract as to real estate.

And although the legal and equitable fee simple be vested in a married woman, she and her husband may, nevertheless, be unable effectually to assure it to a purchaser: as where the property is held under a will or settlement which forbids alienation during coverture; for such a restriction is binding, although no trustee be interposed (*l*): nor has the Court of Chancery any power to dispense with it (*m*): nor can trustees, during coverture, safely part with a fund which is affected by such restraint (*n*).

May be restrained from alienation.

But a married woman may, in exercise of a power, pass May convey

(*f*) *Infra*, Ch. XVIII.

(*g*) *Duberley v. Day*, *ubi supra*.

(*h*) *Donne v. Hart*, 2 Russ. & M. 360; *Duberley v. Day*, 16 Beav. 33, 41.

(*i*) *Hanson v. Keating*, 4 Ha. 1; *Wortham v. Pemberton*, 1 De G. & S. 644.

(*k*) *Crofts v. Middleton*, 8 De G. M. & G. 192, 219; overruling *V.-C. W. 2 K. & J.*, 194; see judgment of *L.-J. K. Bruce*.

(*l*) *Daggett v. Meuz*, 1 Ph. 627;

Steedman v. Poole, 6 Ha. 193; see too *re Gaskell's Trusts*, 11 Jur. N. S. 780, and *re Ellis's Trusts*, L. R. 17 Eq. 409, as to the effect of a restraint on anticipation where there is an absolute gift of a fund producing income.

(*m*) *Robinson v. Wheelwright*, 2 Jur. N. S. 32, 554; 6 De G. M. & G. 535; see, however, *Sanger v. Sanger*, L. R. 11 Eq. 470, a case under the Married Women's Property Act, 1870.

(*n*) *Re Gaskell's Trusts*, 11 Jur. N. S. 780.

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under power.

May dispose
of separate
estate.

Or when
judicially
separated.

Or under the

either a legal estate, by limitation of an use, or an equitable estate: and a general power of appointment authorizes an appointment during coverture, unless the terms of the instrument creating the power are clearly inconsistent with such an exercise of it (o); and, after considerable conflict of opinion, it is now settled that in Equity a married woman, not restrained from alienation, has, as an incident of her separate estate and without any express power, as complete a power of disposing of her equitable fee as if she were a *feme sole* (p); but of course a married woman will not be regarded as a *feme sole* in respect of the fee simple, unless it is clear that the fee simple, and not merely the life estate, is limited to her separate use (q).

When a wife has obtained a sentence of judicial separation from her husband, she is, as from the date of the sentence, and during the continuance of the separation, to be considered as a *feme sole* in respect of property of every description which she may acquire, or which may come to or devolve upon her; and, if cohabitation is resumed, all property to which she is then entitled is to be held to her separate use, subject only to any written agreement which she may have entered into with her husband, whilst living separate. If she dies intestate, her property devolves as if her husband were dead (r). A protection order, during its continuance, has the same effect, in respect to the wife's power over property acquired by her since the desertion, as a decree of judicial separation (s).

By the Vendor and Purchaser Act, 1874 (t), when any

(o) *Gould v. Gould*, 2 Jur. N.S. 484.

(p) *Taylor v. Meads*, 11 Jur. N.S. 166; in which case Lord Westbury reviewed the earlier decisions and overruled *Buckell v. Blenkhorn*, 5 Ha. 131, and *Lechmere v. Brotheridge*, 32 Beav. 358; see too *Hall v. Waterhouse*, 11 Jur. N.S. 561; and *Grigby v. Cox*, 1 Ven. s. 518; Sug. Pow. 217, 8th edit.; *Pride v. Dobb*, L. R. 7 Ch.

Ap. 64; *Lewin on Trusts*, 5th edit 553. So also it has been decided in Ireland, *Adams v. Gamble*, 11 Ir. Ch. Rep. 269. See also *infra*, Ch. XVIII.

(q) *Troutbeck v. Boughey*, L. R. 2 Eq. 534.

(r) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 6.

(s) 20 & 21 Vict. c. 85, s. 21.

(t) 37 & 38 Vict. c. 78, s. 6.

freehold or copyhold hereditament is vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*.

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V. and P. Act,
1874, when a
bare trustee.

The mere ceremony of marriage between a woman and a man with whom she is incompetent to contract marriage, of course leaves her merely a *feme sole*; and, as such, able to deal with her property as she thinks fit: but in such a case a purchaser from her, otherwise than by a deed in which her quasi-husband concurs, and acknowledged by her pursuant to the statute, would be entitled to strict proof of the facts creating the incompetency.

Case of
invalid mar-
riage.

The observations already made (*u*) upon fraudulent sales by an infant, apply, it is conceived, to similar transactions by a married woman (*x*), but if the person dealing with her is aware that she is married, he cannot have the benefit of his contract, unless it is formally ratified in the only way in which by law a married woman is permitted to contract (*y*); so if he is aware of her incapacity to confer a good title, he may it seems, lose his right to make her estate liable for the loss which he has sustained by her fraudulent act (*z*).

Relief against
fraudulent
sale by married
woman.

By the 8th section of the Married Women's Property Act, 1870, (*a*), it is provided that where any freehold, copyhold, or customary-hold property shall descend upon any woman, married after the passing of the Act, as heiress or coheiress of an intestate, the *rents and profits* of such property are, subject and without prejudice to the trusts of any settlement

Married
Women's Pro-
perty Act,
1870.

(*u*) *Supra*, pp. 3, 4.

(*x*) See *Jones v. Kearney*, 1 Dru. & W. 134; *Savage v. Foster*, 9 Mod. 35; and 6 Ves. 181; *Derbshire v. Home*, 3 De G. M. & G. 80; *Blackie v. Clark*, 15 Beav. 603; *Vaughan v. Vanderstegen*, 2 Drew. 368, 408; *Liverpool Association v. Fairhurst*, 9 Exch. 422; *Barrow v. Barrow*, 4 K. & Jo. 409; *Sharpe v. Foy*, L. R. 4 Ch. Ap. 35; *re Lush's Trusts*, *ib.* 591.

(*y*) *Nicholl v. Jones*, L. R. 3 Eq. 696, 709, 710; distinguish this case from *Savage v. Foster*, *supra*.

(*z*) *Arnold v. Woodham*, L. R. 16 Eq. 29.

(*a*) 33 & 34 Vict. c. 93. This is the only section in the Act which affects the real estate of a married woman. See the Amendment Act, 37 & 38 Vict. c. 50.

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affecting the same, to belong to such woman for her separate use, and her receipts alone are to be sufficient discharges for the same. It seems, however, doubtful whether this section enables a married woman in Equity to contract for the absolute sale of real estate coming within its provisions; and also whether the section extends to real estate, which after the passing of the Act descends upon a woman who is at the time unmarried, but who subsequently marries.

By the 12th section of the Act the husband of a woman married after the passing of the Act was exempted from all liability in respect of her debts contracted before marriage, but the wife, and her separate property, were made liable to satisfy such debts as if she had continued unmarried; and this liability has been held to extend to property to which she is entitled for her separate use without power of anticipation (b). This section, so far as it exempted the husband from liability, has been repealed, and he is now liable to be sued jointly with his wife, and the debt or damages may be recovered against him to the extent of the assets received from his wife as defined by the amending Act (c).

Traitors,
felons, &c.

Or, lastly; The proposed vendor may have been guilty of treason, or murder, either as principal or accessory before the fact (d); and have thereby subjected his land to forfeiture, and escheat, upon his attainder (e), that is upon sentence of death being passed upon him (f); or of any other felony punishable with death, attainder upon which involves forfeiture during life (g); or he may have incurred a præmunire (h): and in any of these cases, or at least in any of the first three, his conveyance, although *bond fide*, for valuable consideration, and to a purchaser without notice, was prior

(b) *Bunger v. Sanger*, L. R. 17 Eq. 479.

(c) 37 & 38 Vict. c. 50.

(d) 54 Geo. III. c. 145; 3 Geo. IV. c. 31, s. 2.

(e) 3 Bac. Abr. 750.

(f) 4 Jerm. Cr. nv. by S. 74.

(g) 4 Bl. Com. 385; and 54 Geo. III. c. 145.

(h) 16 Ric. II. c. 5.

to the 33 & 34 Vict., c. 23, subject to the inchoate rights of the Crown, or the lord of the fee (*i*). In these cases, however, that which we have, for convenience, referred to as an incapacity to sell was in strictness, a mere want of title as against the Crown or lord of the fee. The effect of attainder was not avoided by a subsequent conditional free pardon in the penal colony (*k*); nor had a pardon under the sign manual the efficacy or legal effect of a pardon under the Great Seal (*l*); but property acquired by the convict's own industry, after an absolute or conditional remission of his sentence by the governor of the penal colony, was protected by statute against the claims of the Crown (*m*). Leaseholds of traitors and felons were, until the recent Act, forfeited to the Crown upon conviction (*n*); but, of these, a *bond fide* sale between the crime and the conviction, would, it seems, be held good (*o*). A felon's share of money, which was impressed with the character of realty, would not, in the absence of anything to change its character, be treated as personalty so as to let in the Crown's claim by forfeiture (*p*). By the 33 & 34 Vict., c. 23, the forfeiture and escheat of lands and goods for treason and felony is abolished, but the Act does not affect the law of forfeiture consequent upon outlawry (*q*); a convict, *i.e.*, a person against whom, after the passing of the Act, judgment of death or of penal servitude, shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony (*r*), is rendered incapable, while he remains subject to the operation of the Act, of alienating or charging any property, or of entering into any contract (*s*); but any property which he may acquire while lawfully at large, under any licence, is not subject to these

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Effect of
pardon.

Forfeiture for
felony now
abolished.

(i) See *Crosse v. Gayer*, Cro. Car. 172; 6 Bac. Abr. 383; 4 Jarm. Conv. by S. 75.

(k) *Re Church*, 14 Jur. 617.

(l) *Bullock v. Dedde*, 2 B. & Al. 258.

(m) 5 Geo. 4, c. 84, s. 26. *Gough v. Davies*, 2 K. & J. s. 23; which see as to the general effect of pardon.

(n) 4 Bl. Com. 388.

(o) 4 Bl. Com. 388. See *Whitaker v. Wisbey*, 12 C. B. 44.

(p) *R^e Harrop's Estate*, 3 Drew, 726; *re Thompson's Trusts*, 22 Beav. 508.

(q) Sect. 1.

(r) Sect. 6.

(s) Sect. 8.

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disabilities (t). The Crown has power to appoint an administrator, in whom, upon his appointment, all the real and personal property of the convict is to vest (u); and he has an absolute power to let, mortgage, sell, convey, and transfer any part of such property as he thinks fit (x); and full directions are given as to the management of the convict's property, which, subject to the payments and allowances authorized by the Act, is to revert to the convict or his representatives on the completion of his sentence, or on his pardon or death (y). If no administrator is appointed, an interim curator may be appointed by a Court of Petty Sessions or by a Justice of the Peace, to administer and manage the property and affairs of the convict (z); his duties are analogous to those of a receiver of real and personal estate (a); he has, it would seem, no power to sell or mortgage real estate; nor can he sell or transfer any personal estate, except with the authority of the Court or a Justice (b).

Bankrupts.

So, the incapacities of bankrupts and insolvents to sell, depend merely upon their want of title as against their assignees; but in one case, of doubtful authority, it was held that an uncertificated bankrupt might, as against his assignees, make a good title in favour of a mortgagee subsequent to and without notice of the bankruptcy (c).

Incapacitated
owners may
sell under
Lands C. C.
Act, 1845.

And, with reference to incapacities to sell both of the 1st and of the 2nd descriptions, we may here refer to the general consolidating Act of the 8 Vict. c. 18; which enables owners of partial estates and incapacitated owners (including tenants in tail precluded from alienation by Act of Parliament (d), and tenants for life with a restriction against alienation (e)) to sell land to the promoters of undertakings authorized by

(t) Sect. 30.

(u) Sects. 9 and 10.

(x) Sect. 12.

(y) Sect. 18.

(z) Sect. 21.

(a) Sect. 24.

(b) Sect. 25. *Qy.*, whether under his general powers of management he can

let the real estate of the convict.

(c) *Re Cazenove's Legacy*, 2 Jur. N. S. 157; and *cases* cited in the Reporter's note.

(d) *Ex parte Earl of Abergavenny*, 19 Beav. 153.

(e) *Devenish v. Brown*, 2 Jur. N.S. 1043.

Acts in which the general Act is incorporated (*f*): and to the provisions of the Commons' Inclosure (*g*), and Land-tax Redemption (*h*) Acts, which empower such owners to effect sales for the purpose of meeting the expenses of inclosure, or of discharging their other settled estates from land tax; and to the provisions of the Acts authorizing leases and sales of settled estates under the direction of the Court of Chancery (*i*); and to the provisions of the Acts authorizing the sale of the residences of the clergy, and of glebe lands in certain cases (*k*); and to the provisions of the Improvement of Land Act, 1864 (*l*); and to the provisions of the Acts empowering the Secretary of State for War to acquire lands for the defence of the realm (*m*); and to the Acts authorizing the gift or sale by incapacitated owners of land as a site for schools (*n*), or for churchyards (*o*), or for sites for places of religious worship, &c. (*p*), and generally to the Acts incorporating the provisions of the Lands Clauses Consolidation Act.

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And under
Inclosure
and Land
Tax Redemp-
tion Acts.

And under
Leases and
Sales, &c.,
Acts.

And under
Defence Acts.

And other
Acts.

We may here also refer to the statutory power which by the Vendor and Purchaser Act, 1874 (*q*), Sect. 4, is given to the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee has been admitted to convey or surrender the mortgaged estates *on payment* of all sums secured by the mortgage. Apparently this section is now in operation whether the mortgage was

Personal repre-
sentative of
mortgagee
under V. & P.
Act, 1874.

(*f*) See sects. 6, 7, *et seq.*

(*g*) 6 & 7 Will. IV. c. 115, ss. 46, 47; 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70; Acts for facilitating drainage, 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 38; 12 & 13 Vict. c. 100; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9. See also the Amendment Acts, 10 & 11 Vict. c. 114; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43.

(*h*) 42 Geo. III. c. 116, ss. 14, 53, 98; 54 Geo. III. c. 70, s. 44, c. 173, ss. 6, 8, 12; 57 Geo. III. c. 100; 1 & 2 Vict. c. 57; 16 & 17 Vict. c. 74, s. 117. See *Beaden v. King*, 9 Ha. 499.

(*i*) 19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; and 37 & 38 Vict. c. 33; as to which, *vide infra*, Ch. XX.

(*k*) 1 & 2 Vict. c. 23, s. 7, *et seq.*; 2 & 3 Vict. c. 49, s. 15, *et seq.*

(*l*) 27 & 28 Vict. c. 114; see too, the Limited Owners' Residences Act, 1870, 33 & 34 Vict. c. 56, partially repealed and amended by 34 & 35 Vict. c. 84.

(*m*) 5 & 6 Vict. c. 94; 18 & 19 Vict. c. 117; 23 & 24 Vict. c. 112.

(*n*) 4 & 5 Vict. c. 38; 12 & 13 Vict. c. 49.

(*o*) 30 & 31 Vict. c. 133

(*p*) 36 & 37 Vict. c. 50.

(*q*) 37 & 38 Vict. c. 78, s. 4.

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executed, or the death of the mortgagee occurred previously to or since the passing of the Act, if only the mortgage debt is paid off after the 7th August, 1874; nor is it confined to the case of a mortgagee dying intestate as to his mortgage estate. As the section is framed, the power only arises on payment of all sums secured by the mortgage: and it may be made a question whether a realization from an exercise of a power of sale would amount to "payment" within the meaning of the Act. Assuming, however, as seems probable, that such would be held to be the case, still if the sale is for a sum insufficient, after payment of expenses of sale, to discharge the entire amount due on the security, the section does not apply; and on a sale in lots to several purchasers the title of each purchaser to the legal estate will in many cases depend upon its being shown that prior to the execution of his conveyance the vendor had received the purchase-moneys for the other lots. It may also be a question whether the section includes the case of a mortgagee who, having been paid off, dies without having reconveyed.

Incapacity of
charity trustees.

There is no positive law that property belonging to a charity shall be absolutely inalienable, but the onus is thrown on the alienee and those claiming under him of showing that the sale was beneficial to the charity (r); and, unless this can be done, the transaction will be set aside (s). There is naturally a strong presumption that land, once devoted to the charitable purpose, is intended for ever to remain inalienable; but under special circumstances the right to alienate it may be presumed. Thus where a sale of charity lands had taken place at a very distant date, and had always been acquiesced in, and the origin of the charity was lost in obscurity, it was held that

(r) See e. g. *Att.-Gen. v. Brettingham*, 3 Beav. 91.

(s) As to the alienation of charity lands by trustees, see *Att.-Gen. v. Green*, 6 Ves. 422; *Att.-Gen. v. Corp. of Newark*, 1 Ha. 395; *Att.-Gen. v. Brettingham*, 3 Beav. 91; *Att.-Gen.*

v. South Sea Co., 4 Beav. 453; *Att.-Gen. v. Pargiter*, 6 Beav. 150; *Att.-Gen. v. Pilgrim*, 12 Beav. 57; 2 Mac. & G. 414; *Att.-Gen. v. Magdalen College*, 18 Beav. 323, and cases cited; *Att.-Gen. v. Doney*, 19 Beav. 521; 4 De G. & J. 182.

a power in the trustees to sell might be presumed (t). The Court of Chancery has power under its general jurisdiction, and also under Sir Samuel Romilly's Act (52 Geo. III. c. 101), to direct a sale of charity property, without the sanction of the charity commissioners (u); and, notwithstanding any of the disabling statutes, sales of charity lands may now be effected under 16 & 17 Vict. c. 137, s. 24 (x). So, where, corporations or trustees in the United Kingdom, holding moneys in trust for any public or charitable purpose have, under the 33 & 34 Vict. c. 34, invested their trust funds in any real security, and the equity of redemption of the premises comprised therein has become liable to foreclosure, or has been otherwise barred or released, the same are by the Act directed to be sold and converted into money. But without the express authority of Parliament or the Court of Chancery, or unless they are acting under a scheme legally established, or with the approval of the commissioners, charity trustees are now prohibited from selling or charging any portion of their charity lands (y). By a recent statute (z) the trustees of any charity for religious, educational, literary, scientific, or public charitable purposes, upon obtaining from the charity commissioners a certificate of incorporation, may in their corporate name hold, acquire, convey, assign, or demise any present or future property belonging to their trust, but only in the same way and subject to the same restrictions as they might have done without such incorporation.

We may here also conveniently refer to the limited powers of alienation, which, in respect of corporate property, have been conferred by the following statutes:—The 14 & 15 Vict. c. 104 authorizes ecclesiastical corporations, with the approval

Of ecclesiastical corporations.

(t) *Att.-Gen. v. Magdalen Col.* 6 H. L. Ca. 189.

(u) *Re Ashton Charity*, 22 Beav. 288.

(x) And see 18 & 19 Vict. c. 124, s. 38.

(y) 18 & 19 Vict. c. 124, s. 29. As to what accounts are directed in

charity informations, see *Att.-Gen. v. Drapers Co.* 6 Beav. 382; *Att.-Gen. v. Pretyman*, 4 Beav. 466; *Att.-Gen. v. Hall*, 16 Beav. 388; *Att.-Gen. v. Magdalen College*, 18 Beav. 228; *et vide infra*, Ch. XXI.

(z) 35 & 36 Vict. c. 24.

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of the church estates commissioners, to sell, enfranchise, and exchange church lands, or to purchase the interests of their lessees; and these powers, at first temporary, have been continued by later Acts (a). The 19 and 20 Vict. c. 95 authorizes sales and exchanges of land held by the university of Oxford or any of its colleges, or by Winchester College, and amended and extended by the 23 & 24 Vict. c. 59; by the 21 & 22 Vict. c. 44, restricted powers for the sale, enfranchisement, and exchange of lands are given to the universities of Oxford, Cambridge, and Durham, and their several colleges, and to the colleges of Eton and Winchester. Workhouses, lands, and other parish property may be sold under 5 & 6 Vict. c. 18 (b). We may also refer to the restrictions imposed on sales by municipal corporations by the 94th section of the 5 and 6 Will. IV. c. 76, and to the powers of alienation given by the Land Tax Redemption Acts.

Of municipal
corporations.

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(2.) *Who are relatively incompetent to sell.*

Who are
relatively
incompetent
to sell.

Persons
having no
transferable
interest.

Incapacities to sell of the second description may be considered to consist in, 1st, the want of a transferable (c) title to the property proposed to be dealt with; and, 2ndly, the existence of some relation between the proposed vendor and the purchaser which prevents a sale except under special precautions.

Persons
standing in
special
influential
relation
towards
proposed
purchaser.
Conditions
in restraint

Upon the first of these subdivisions we may remark, that a right of alienation is generally incidental to and inseparable from the beneficial ownership of property. Thus a mere declaration annexed to a gift to A. in fee (d)—or, it is conceived, for any estate (e)—that the property shall not be aliened, or shall not be charged (f), is repugnant and void;

(a) 17 & 18 Vict. c. 116; 19 & 20 Vict. c. 74; 20 & 21 Vict. c. 74; 21 & 22 Vict. c. 57; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124, s. 28; 24 & 25 Vict. c. 131.

(b) See too 20 & 21 Vict. c. 13.

(c) See *Att. Gen. v. Corp. of Plymouth*, 9 Beav. 67; where a corporation was held incapable in Equity of contracting to sell property, by reason of a duty which it owed in respect

thereof to the public. As to the remedy in cases of collusive alienations of corporate property, see 5 & 6 Will. IV., c. 76, s. 97, and *Att. Gen. v. Wilson*, 9 Sim. 30.

(d) Co. Litt. 206 b, 223 a; 2 Jarm. Wills, 3rd edit., p. 15.

(e) See, as to an estate for life, *Rockford v. Hackman*, 9 Ha. 475; and see *Bird v. Johnson*, 13 Jur. 976.

(f) *Williv. Biscon*, 4 Myl. & Cr. 201.

the estate cannot be preserved to A. despite his own voluntary acts or involuntary misfortunes: but, within certain limits, which do not seem to be very clearly defined by the authorities (g), the estate limited to him may be made to determine or go over on the occurrence of any thing which, in case he were absolute owner, would operate as a voluntary or involuntary alienation. But though a man may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy, he cannot, by contract or otherwise, qualify his own interest by a condition to take effect on his own bankruptcy, though it seems he may do so by a condition to take effect on his own attempted alienation, although for value (h). Where the condition is in an active form, requiring something to be done by the grantee, and there is no collusive purpose, an act *in invitum*, such as bankruptcy, or the giving of a warrant of attorney, is not a cause of forfeiture (i). The case of a married woman furnishes an exception from the general rule: she, as we have already seen (k), may, in Equity, be effectually restrained while covert from dealing with even her fee simple estate: and no condition or gift over is necessary to give effect to the restriction; inasmuch as it operates to create in her a personal disqualification to contract or convey the particular property: the provision in such a case being one, not of forfeiture but of preservation.

We may here remark that the fact of a woman being a professed nun does not affect her capacity to take or dispose of property (l).

Upon the 2nd subdivision we may instance the case of an agent for purchase, who cannot sell his own estate to his principal, without acquainting him with the facts (m): and, as

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of alienation:—how
far valid.

Undue
influence.

(g) See Co. Litt. 223, a.; *Muschamp v. Bluet*, Bridg. R. 182; *Ware v. Cann*, 10 B. & Cr. 433; *Doe v. Pearson*, 6 East, 179; *Large's case*, 2 Leon. 82; 1 Coll. C. C. 445; *Willis v. Hiccox*, 4 Myl. & Cr. 302; *Attwater v. Attwater*, 18 Jur. 50, n. 2 Jarm. Wills, 3rd edit. 17.

(h) *Knight v. Browne*, 7 Jur. N. S. 894; *Brooke v. Pearson*, 5 Jur. N. S., 781.

(i) *Avison v. Holmes*, 1 J. & H. 530; and see cases cited in note, *ib.* p. 540.

(k) *Supra*, p. 10.

(l) *Re Metcalfe's Trusts*, 2 De G. Jo. & S. 122; 10 Jur. N. S. 224, 287.

(m) *Gillell v. Pyppercorne*, 3 Beav. 78; *Rothschild v. Brookman*, 2 Dow. & Cl. 188; *Bentley v. Craven*, 18 Beav. 75; *Blake v. Mowatt*, 21 Beav. 603.

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a general rule, whenever such a relation subsists between contracting parties as may enable one to exercise undue influence (n) over the other, whether the relation be that of parent and child (o), guardian and ward, legal adviser and client (p), trustee and *cestui que trust*, medical man and patient, spiritual adviser and penitent, or whatever else may be the nature of the confidential relation, if influence is acquired and abused, or confidence reposed and betrayed (q), the Court, upon proof of the exercise of such undue influence, will set aside the transaction; and the circumstance of the real facts not being stated on the face of the assurances will be considered *prima facie* evidence of fraud (r).

Sect. 3.

Who are generally incompetent to purchase. Corporations cannot hold without licence.

(3.) Who are generally incompetent to purchase.

Purchasers must, necessarily, be either individuals or a corporation: corporations, of whatever description, may purchase, but cannot, in their corporate capacities, hold land, except under a licence to hold in mortmain (s), or under the special provisions of an Act of Parliament (t).

(n) See *Casborne v. Barsham*, 2 Beav. 76; *Cooke v. Lamotte*, 15 Beav. 234, 239; *Coulson v. Allison*, 2 De G. F. & Jo. 521.

(o) *Hoghton v. Hoghton*, 15 Beav. 278; see *Beauland v. Bradley*, 2 Sm. & G. 339; *Wright v. Vanderplank*, 2 K. & J. 1; *Dimsdale v. Dimsdale*, 3 Drew. 556.

(p) *Brown v. Kennedy*, 33 Beav. 133; 10 Jur. N. S. 141.

(q) *Smith v. Kay*, 7 H. L. Cas. 750; *Harrison v. Guest*, 6 D. G. M. & G. 432; *Rhodes v. Bate*, L. R. 1 Ch. Ap. 252; *Tate v. Williamson*, L. R. 1 Eq. 528; L. R. 1 Ch. Ap. 56; and see *Haggarth v. Wearing*, L. R. 12 Eq. 320; where the fiduciary relation was held not to be established, but the deed was set aside on other grounds.

(r) See *Mulhollen v. Martin*, 8 Dru. & W. 217; *Alphorne v. Hogan*, 1 Dru. 316; *Gibson v. Bower*, 2 Y. & C. C. 104; *Smith v. Hatch*, 9 Ves. 202,

Huguenin v. Basdeley, 14 Ves. 273; 2 Wh. & Tud. L. C. 406; *Dent v. Bennett*, 4 Myl. & C. 269; *Harvey v. Mount*, 8 Beav. 489; *Billage v. Southce*, 9 Ha. 534; *Baker v. Loader*, L. R. 16 Eq. 49; and cases therein respectively cited; see too *Middleton v. Sherburne*, 4 Y. & C. 358.

(s) Co. Litt. 2 b. A benefit building society under the 6 & 7 Will. 4, c. 32, might purchase real estate; *Mullock v. Jenkins*, 14 Beav. 628; but this Act, except as to subsisting societies, has been repealed by the 37 & 38 Vict. c. 42, which apparently restricts the power of such a society to hold land to what they hold by way of mortgage, or acquire by foreclosure. See as to question, 16 & 17 Vict. c. 137, s. 27; 18 & 19 Vict. c. 125, ss. 38 and 41; and *supra*, s. 1.

(t) In a recent case, *Perring v. Traill*, L. R. 18 Eq. 68, it was held that a statutory power conferred on a charity to acquire land by will, im-

Purchases by individuals, unincorporated, must be made by them in their private capacities and individual names:

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e. g. a purchase by, *eo nomine*, the inhabitants of a place, or the parishioners or churchwardens of a parish, is bad; so is a similar purchase by, or grant to, the commoners of a waste (u).

Purchase by unincorporated class, bad.

But, by custom, in London and elsewhere, the parson and churchwardens are a corporation to purchase and hold land (x); and so, by statute, are churchwardens and overseers generally in some matters relating to the Poor Laws (y), and to Education (z). So, too, certain quasi corporate bodies, as Local Boards of Health established under the Public Health Act, 1848 (a), and Improvement Commissioners acting as Burial Boards (b), or the Sanitary Authorities under the Public Health Act, 1872 (c), to which these local jurisdictions have now been transferred, may purchase and hold lands for the purposes authorised by their Acts. So, too, public companies formed under the Companies Act, 1862, may hold lands: but if formed for the promotion of art, science, religion, or charity, or any like object not involving the acquisition of gain, the quantity so held must not exceed two acres, unless the Board of Trade sanctions a larger holding (d).

Parochial corporations may purchase and hold.

So also local boards, &c.

Public companies.

We may here also refer to the 21st & 22nd Vict. c. 92, as amended by the 34 Vict. c. 14, under which contracts for the purchase of property for certain county purposes may be entered into in the name of the Clerk of the Peace on behalf of the Justices, and the purchased property may be conveyed to the Clerk of the Peace, and will vest in his successors in the office from time to time.

Purchases for county purposes.

place a power to devise land for the purposes of the charity.

(u) Co. Litt. 3, a.

(x) See *Warner's case*, Cro. Jac. 532; note (4) to Co. Litt. 3, a.

(y) 9 Geo. I. c. 7, s. 4; Sug. 883.

(z) Jointly with the minister; see 4 & 5 Vict. c. 38, ss. 7 & 8; 12 & 13 Vict. c. 49; and 14 Vict. c. 24.

(a) 11 & 12 Vict. c. 63.

(b) 20 & 21 Vict. c. 81; 23 & 24 Vict. c. 64. As to the metropolitan area, see 16 & 17 Vict. c. 134; 18 & 19 Vict. c. 128; 20 & 21 Vict. c. 35, 81; 24 & 25 Vict. c. 101.

(c) 35 & 36 Vict. c. 79; and see the Amendment Act of 1874, 37 & 38 Vict. c. 89.

(d) 25 & 26 Vict. c. 89, ss. 18, 21.

Class I.
Alien could
not hold.

Previously to the passing of the Naturalization Act, 1870, an alien might purchase before denization; but the Crown might at any time assert its right to the property (e), unless the alien was a subject of a friendly state, and the property was taken for the purposes of his own residence or business for a term not exceeding twenty-one years (f); and the Crown might exercise the right of re-entry, without the necessity of any inquisition being taken, or office found (g). Before the Crown had exercised its right of re-entry, an alien might make a conveyance to a natural-born subject, which though it could not defeat the prior right of the Crown, would be valid in every other respect (h). The Crown could, it was said, claim land vested in trustees for an alien (i); but not his share of the produce of sale of real estate, devised in trust to sell (k); nor, according to a modern decision, the benefit of an executory trust to convey land to an alien (l); but on appeal, the grounds of the decision were not approved; and they were expressly dissented from in a later case (m).

Leases to,
were formerly
void.

The claim of the Crown extended to terms for years (n); and, until recently, the only exception was of leases of habitations of alien merchant friends during their lives and residence within the realm (o). Leases, or agreements for a lease (p), to alien artificers or handicraftsmen, were, prior to the now repealed statute of 7 & 8 Vict. c. 66, absolutely void;

(e) Co. Litt. 2 b. *Rees v. Holland*, Ayleyn, 14; *Dumoncel v. Dumoncel*, 13 Ir. Eq. R. 93.

(f) 7 & 8 Vict. c. 66, s. 5, now repealed by 33 Vict. c. 14.

(g) 22 & 23 Vict. c. 21, s. 25.

(h) Shep. Touch. 232.

(i) 1 Beav. 90; Sug. 685; but see *Ritson v. Stordy*, 3 Sm. & G. 280, affirmed on other grounds, 2 Jur. N. S. 430, but expressly dissented from, in *Barrow v. Wadkin*, 24 Beav. 1, where the prior cases are very fully reviewed; see too *Sharp v. St. Saviour*, L. R. 7 Ch. Ap. 553, where *Barrow v.*

Wadkin is approved of.

(k) *Du Hourmelin v. Sheldon*, 4 Myl. & C. 525; and see p. 530, as to distinguishing *Pourdrie v. Cowday*, 3 Myl. & K. 583.

(l) *Ritson v. Stordy*, 3 M. & G. 230.

(m) *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Saviour*, L. R. 7 Ch. Ap. 543.

(n) Co. Litt. 2 b; *Rees v. Bainton*, 4 East. 107.

(o) 32 Hen. VIII. c. 16, s. 13.

(p) *Lapierre v. M'Intosh*, 1 Pat. & D. 629; 9 Ad. & E. 567.

although an assignment to an alien artificer of a subsisting lease has been held valid (q). By that Act, however, a resident alien friend might hold any lands, houses, or other tenements, for the purpose of residence, or of occupation by himself or his servants, or for the purpose of any business, trade, or manufacture, for any term not exceeding twenty-one years, as if he were a natural-born subject (r).

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Exception
of certain
leases under
7 & 8 Vict.
c. 66.

But by the recent Act (v) the disabilities of an alien as respects the acquisition of real and personal property have been almost entirely removed; and he may now acquire, hold, and dispose of real property situate within the United Kingdom as freely as a natural-born British subject; but until he has obtained a certificate of naturalization after the period of residence, and in the manner prescribed by the Act (t), he cannot hold office, or exercise any municipal, parliamentary, or other franchise. The Act is not retrospective (u); nor does it confer upon an alien any right to hold real property situate out of the United Kingdom (x).

Naturaliza-
tion Act, 1870.

By the 7 Anne, c. 5, 4 Geo. II. c. 21, and 13 Geo. III. c. 21, the children of a male British-born subject, or of his son, are, with certain special exceptions (y), to be considered natural-born subjects; and, by the 7 & 8 Vict. c. 66, the child born of a British mother out of the Queen's allegiance is enabled to hold land (z); and by the 33 Vict. c. 14, where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, is to be deemed a naturalized British subject (a); and

Natural-born
subject—who
is.

(q) *Wootton v. Steffenoni*, 12 M. & W. 129.

(r) Sect. 5.

(s) 33 Vict. c. 14; amended as respects the taking of oaths of allegiance by 33 & 34 Vict. c. 102.

(t) Sect. 7, *et seq.*

(u) *Sharp v. St. Sauveur*, L. R. 7 Ch. Ap. 343, and see sect. 2, subsect. 3.

(x) Sect. 2, subsect. 1.

(y) As to which, see the Acts, and *Fitch v. Weber*, 6 Ha. 51.

(z) Sect. 3.

(a) Sect. 10, subsect. 5; see the preceding sections as to the readmission to British nationality where the status has been lost, and generally as to the national status of women and children.

~~Chap. I.~~
~~Sec. 1.~~ by the 21 & 22 Vict. c. 93, sect. 2, any person domiciled in England or Ireland, or claiming any real or personal estate in England, may, on petition to the Court for Divorce, obtain a binding declaratory decree of his right to be deemed a natural-born subject. Illegitimate children do not come within these provisions, although legitimatised according to a foreign law by the subsequent marriage of their reputed parents (b). The 33 Vict. c. 14, also contains provisions (c), under which naturalized or natural-born British subjects may divest themselves of their nationality, and become aliens.

Denization.

The right of the Crown to grant letters of denization is not affected by the Naturalization Act, 1870 (d); but the privileges which are incident to denization are less comprehensive than those which are now enjoyed by every alien, and there seems to be no reason why this prerogative of the Crown should be preserved. After denization, the alien can both purchase and beneficially hold land; but, as the letters patent have not a retrospective operation, the denizen cannot take by inheritance; nor are his issue born before denization capable of inheriting from him (e). The denizen is entitled to land purchased before denization, if the Crown, before office found, has, by the letters patent of denization, confirmed his estate (f).

Naturalization.

Naturalization, for the purpose of holding land, could formerly be obtained only by a special Act of Parliament (g); but, by the 7 & 8 Vict. c. 66, a resident alien might obtain a certificate of naturalization; under which (so far as the possession and enjoyment of property are concerned, and subject to any special exceptions contained in the certificate), he acquired all the rights and capacities of a natural-born

(b) *Shadden v. Patrick*, 1 Macq. H. L. 524; a case arising on the 4 Geo. IV.

(c) 33 & 34.

(d) 33 & 34.

(e) *See Phipps v. Phipps*, 3 Mer. 422.

(f) *Fourdrin v. Gwyder*, 3 Myl &

K. 552.

(g) As to naturalization in the Colonies, see 10 & 11 Vict. c. 62, as to subjects of the United States, see 37 Geo. III. c. 97; *Do v. Adkins*, 2 B. & Cr. 779; *Sutton v. Sutton*, 1 R. & Myl 663.

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subject; and now, by the 33 Vict. c. 14 (*h*), an alien who has resided in the United Kingdom, or has been in the service of the Crown, for not less than five years, and intends when naturalized either to reside in the United Kingdom or to serve under the Crown, may obtain from one of Her Majesty's principal Secretaries of State a certificate of naturalization; upon obtaining which and taking the oath of allegiance required by the Act (*i*), the alien becomes entitled to all political and other rights, powers, and privileges, and subject to all the obligations of a natural-born British subject in the United Kingdom, except that, when within the limits of the foreign state of which he was previously a subject, he is not to be deemed a British subject, unless he has lost his former nationality; and an alien who has been naturalized under the 7 & 8 Vict. c. 66 may obtain a certificate of naturalization under the recent Act, as if he were not already naturalized. A married woman is to be deemed to be a subject of the state of which her husband is for the time being a subject, but a widow, being a natural-born British subject, who has become an alien by her marriage, is merely a statutory alien, and as such may be readmitted to her British nationality in manner provided by the Act (*k*). It is conceived that in no case does naturalization affect the previously acquired title of the Crown.

Of female
alien by
marriage.

An infant can purchase; but on his attaining twenty-one, he may, at his option, adopt or abandon the contract (*l*): and should he, either having attained twenty-one, die without exercising or relinquishing such option, or die under that age, the like privilege descends on his representatives. The purchase of an annuity by an infant was made absolutely void by statute, and incapable of confirmation after majority (*m*); but this has been repealed by a later Act (*n*).

Infant purchasing may elect, after majority.

Any written instrument signed by the infant after attaining

What amounts

(*h*) Sects. 7, et seqq.

(*i*) Sect. 9.

(*j*) See sect. 10. Compare sect. 16 of the 7 & 8 Vict. c. 66.

(*l*) *Ketley's or Ketoe's case*, 1

Brownl. 120; Cro. Jac. 320; Co. Litt. 2 b.

(*m*) 53 Geo. III. c. 141, s. 8.

(*n*) 17 & 18 Vict. c. 90.

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to confirma-
tion.

majority is a ratification, if of such a nature as that, if signed by an adult, it would amount to an adoption of the act of a party professing to act as his agent (o): and where a written ratification is proved, the infant must show, if he can, that when he gave it, he had not attained majority (p). It is conceived that the Infant Relief Act, 1874, does not apply to the confirmation of such a contract.

He may be
bound by
simple acquiescence.

And an express ratification is not essential; mere acquiescence may suffice: e.g., occupation or receipt of the profits, without dissent, for a short time after attaining majority, would, it is conceived, confirm the transaction by election (q): but the vendor cannot maintain an action for the purchase-money, unless he can prove a ratification in writing (r).

What time
allowed for
election.

No precise rule can be laid down as to the time within which the infant, after attaining majority, must elect. An unexplained acquiescence of three or four months (s), or, even a shorter period (t) in the case of a purchase, would probably amount to confirmation; but the delay of a fortnight would not be unreasonable (u). If his election be to avoid the purchase he ought to disclaim (x).

Whether he
can recover
price.

And, although the infant may abandon the contract, and thus relieve himself from all unsatisfied liabilities under it, he cannot, it is said, recover money which he has actually paid, unless such payment were procured by fraud (y), or except in cases where he has derived no benefit from the con-

(o) *Harris v. Wall*, 1 Exch. 122.

(p) *Hartley v. Wharton*, 3 Per. & D. 529.

(q) See 8 Taunt. 42; *Cork and Bandon R. Co. v. Cazenore*, 10 Q. B. 935; *Newry and Enniskillen R. Co. v. Coombe*, 3 Exch. 716; *Leeds and Thirsk R. Co. v. Fearnley*, 4 Exch. 26; *Northampton R. Co. v. M'Michael*, 5 Exch. 114; *Birkenhead, &c., R. Co. v. Pülcher*, *ibid.*; *Dublin and Wexford R. Co. v. Black*, 20 L. T. 70.

(r) 9 Geo. IV. c. 14, s. 5; see *Mason v. Blake*, 22 L. T. 246.

(s) *Kelley's or Ketsey's case*, 1 Brownl. 120; Cra. Jac. 320.

(t) See judgment in *Holmes v. Blogg*, 8 Taunt. 42, Park, J.; and *Birkenhead, &c., R. Co. v. Pülcher*, 5 Exch. 127.

(u) 2 T. R. 439.

(x) See 5 Exch. 128; *Goode v. Harrison*, 5 B. & A. 147.

(y) *Maeph. on Infants*, 484; *Wilson v. Keates*, 2 Fea. N.P.C. 196; see *Chamb. on Inf.* 431; *Ex parte Taylor*, 8 De G. M. & G. 254.

tract (x); and if he be unable to restore the consideration, this will be an additional bar to the action: for instance, where an infant paid a premium for a lease of business premises, and entered upon and occupied them, it was held, upon his attaining majority and repudiating the lease, that, whatever might be the general rule, he could not, under the circumstances, recover the premium, inasmuch as he had enjoyed a part of that term, for which it formed the consideration (a): and although, upon the purchase of the fee simple the same decisive effect might not always be attributable to mere occupation (b), any act affecting the value of the estate, e.g., the felling of ornamental timber (c), or the removal or alteration of buildings, &c., would, it is conceived, be conclusive against his right to reclaim the purchase-money.

If, however, the infant had fraudulently represented himself to the vendor as an adult, Equity, it is conceived, would relieve the vendor by restraining any action for the purchase-money (supposing such action to be maintainable), and would allow the vendor to avail himself of any collateral securities which he might hold for the unpaid balance: but it could not enforce any security given by the purchaser personally during his infancy; such being absolutely void (d).

Fraudulent purchase by relieved, against, in equity: *semble*.

A lunatic or idiot may purchase; and, according to the early authorities, cannot himself, though he recover his senses, avoid the transaction: but it may be set aside by the Crown, after office found (e); or by his committee, after inquisition (f); or by his representatives, after his decease, unless he have recovered his senses and agreed to the purchase (g). The present doctrine of the Courts in regard to such purchases

Purchase by lunatic, how far voidable.

(z) See as to avoidance by infants of their contracts, and their right to recover money paid thereunder. *Lindley Partnership*, 86. *Ca. Ab.* 278.

(a) *Holmes v. Blogg*, 8 Taunt. 580. *Ex parte Taylor*, *supra*.

(b) See however *Blackburn v. Smith*, 2 Exch. 783.

(c) As to what is ornamental timber; see *Ford v. Tynte*, 2 De G. Jo. & S. 127.

(d) *Chamb. on Inf.* 444.

(e) *Co. Litt.* 247 a.

(f) *Att.-Gen. v. Parkhurst*, 1 Eq.

(g) *Co. Litt.* 2 b.; 2 Bl. Com. 292; *Shelf. on Lun.* 347.

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seems, however, to accord with that which has been already stated with respect to contracts for sale by lunatics (*h*). In a modern case, a purchase of an estate in consideration of the release of a bond debt, was set aside at the suit of a legatee of the bond debt (*i*).

Purchase by married woman, when voidable.

A married woman may purchase; and can in Equity, by the contract for purchase, bind her separate property, even without referring to it (*k*): in other cases the husband may annul the purchase, and may recover the purchase-money at law, unless she purchased by his authority (*l*); or it may be annulled by herself after his death, although he may have agreed to it; or by her representatives, unless she agreed to it after her husband's decease (*m*).

Cases where a married woman is regarded as a *feme sole*.

Where the married woman is judicially separated from her husband (*n*), or has obtained a protection order under the divorce Acts (*o*), or where her husband is a convicted felon, or an alien enemy, she is at law capable of entering into a binding contract for purchase (*p*).

May be confirmed by acquiescence.

The general rules above referred to, respecting acquiescence by an infant after majority, will, it is conceived, apply to the case of a married woman retaining the estate, after the termination of the coverture: and, in the case of a purchase by a married woman representing herself to be single, or who, contracting as if single, has so dealt with the property as to prevent its perfect restoration *in specie*, Equity would, it is conceived, secure to the vendor all his legal rights, and would restrain the exercise of any adverse legal right by either the woman or her husband, supposing him to have been privy to the fraud.

Fraudulent purchase by, relieved against: *semble*.

(*h*) *Supra*, pp. 6, 7.

(*i*) *Steed v. Colley*, 1 Ke. 620; and see *S. C.*, *Ball v. Mannin*, 3 BH. N.S. 1; cases cited *supra*, p. 4, n. (*u*); and *Waring v. Waring*, 6 Moo. P.C. 341, as to evidence of insanity.

(*l*) *Fide infra*, Ch. XVIII. s. 3; *supra*, p. 686.

(*l*) *Garbrand v. Allen*, 1 Ld. Raym. 224.

(*m*) Co. Litt. 3 a, 356 b; *Barnfather v. Jordan*, Dong. 436; *Eng.* 686.

(*n*) 20 & 21 Vict. c. 35, s. 25, 26.

(*o*) 20 & 21 Vict. c. 75, s. 21; and 21 & 22 Vict. c. 108, ss. 6-10.

(*p*) See *Portland v. Progers*, 2 Vern. 104; and other cases cited, 2 Esp. H. & W. 120.

Roman Catholics were formerly subject to disabilities in this respect, which have been removed by a modern statute (q).

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Sect. 3.

Roman
Catholics.
Traitors,
felons, &c.

Previously to the 33 & 34 Vict. c. 23, persons guilty of treason, or felony, or who had incurred a *præmunire*, might, before judgment, purchase land; but, upon judgment, it became subject to the rights of the Lord of the fee, or of the Crown: and purchases by such persons after judgment were subject to the same rules as purchases by aliens before denization (r). By the 33 & 34 Vict. c. 23, such persons, while continuing subject to the operation of the Act, (i.e., until bankruptcy or completion of the sentence or pardon or death (s)), are incapacitated from entering into any contract (t), except, it would seem, in respect of property which they may acquire while lawfully at large under licence (u); but they are not otherwise prohibited from purchasing land. Upon the appointment, however, of an administrator, whose position and duties are not unlike those of a trustee in bankruptcy, all the property of the felon to which he was entitled at the time of the conviction, or to which he becomes afterwards entitled while subject to the operation of the Act, vests in the administrator (x); so that any purchase made by the felon after his conviction, and not falling within the exception contained in the Act, enures to the administrator for the purposes of the Act.

Upon a purchase by a bankrupt before obtaining his certificate (y), or his order of discharge (z); or by an insolvent under the 1 & 2 Vict. c. 110 (a), before his final discharge, in

Bankrupts
and insol-
vents.

(q) 10 Geo. IV. c. 7. As to the position of Roman Catholics with reference to land devoted to religious or charitable purposes, see 2 & 3 Will. IV. c. 115, and *Anstey on Rom. Cath.* p. 128, *et seq.* As to what are mere voluntary associations and not charitable institutions, see *Cocks v. Manners*, L. R. 12 Eq. 574.

(r) Co. Litt. 2 b; *Ree v. Haddenham*, 15 East, 463; Sug. 884.

(s) Sect. 7.

(t) Sect. 8.

(u) Sect. 30.

(x) Sect. 10.

(y) 6 Geo. IV. c. 16; and see 12 & 13 Vict. c. 106, s. 142; and see now 24 & 25 Vict. c. 134.

(z) 24 & 25 Vict. c. 134, ss. 157, *et seq.*

(a) See sect. 37. The discharge of the debtor, under sect. 44, by the consent or default of the detaining creditor, took the property out of the assignees and reverted it in the debtor. *Grange v. Trickett*, 16 Jur. 286, Q.B.

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case of adjudication, or before his full, i.e., his unconditional discharge (b), if there was no adjudication; or by an insolvent under the 5 & 6 Vict. c. 116 (c), before his debts were paid in full, the land vested in the assignees. After the debts were paid in full, no revesting order, under 5 & 6 Vict. c. 116, was necessary in respect of equitable interests (d); and according to the law, as it existed before the passing of the Bankruptcy Law Consolidation Act, 1849, where the bankrupt's estate had not paid fifteen shillings in the pound, and he had previously been bankrupt, or discharged under an Insolvent Act, or had compounded with his creditors, the rights of the assignees were not affected by his certificate (e). The subsequent statutes do not contain any similar provision. But a bankrupt, although he has not obtained his certificate of conformity under the Act of 1849, or his order of discharge under the Acts of 1861 & 1869, can acquire and hold property against every one but his assignees or trustee.

Insolvent :
judgment
against.

And in the case of an insolvent under the 1 & 2 Vict. c. 110, although property acquired by him after his final discharge did not vest in his assignees, it still remained until his debts were paid in full (f), subject to the judgment which was directed by the 87th section to be entered up against him. The rights of the assignees were, however, subject to the same equities, in favour of third parties, as would have affected an assignee by deed (g); and unless and until judgment was entered up, the insolvent's after-acquired estate was unaffected (h). Such a judgment did not require registration under the Act: but it could not be enforced without permission of the Court, which alone, to the exclusion of the

Satisfaction
on,

(b) *Basham v. Smith*, 22 Beav. 190.

(c) See sect. 7. Insolvent debtors, under the 7 & 8 Vict. c. 70, seem to have been in the same position, as regards after-acquired property, as bankrupts. See sects. 8 and 13.

(d) *Wearing v. Ellis*, 6 De G. M. & G. 596.

(e) 6 Geo. 4, c. 16, s. 127.

(g) *Re Atkinson*, 2 De G. M. & G. 140; *Re Cawthorne*, 4 De G. & S. 551. So in bankruptcy, *semble*, *re Barr*, 6 W. R. 424; 4 Jur. N. S. 1013. Compare *Bartlett v. Bartlett*, 1 De G. & Jo. 127.

(h) *Re Moylan*, 16 Beav. 220; *Holgrave v. Hedger*, 3 Drew. 74; *Hawker v. Halliwell*, 2 Sm. & G. 498.

Superior Courts, had jurisdiction to order satisfaction to be entered up on such a judgment (i).

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Sect. 3.

(4) • *Who are relatively incompetent to purchase.*

Sect. 4.

The remarks already made (k), as to undue personal influence, seem to apply as well to purchasers as to vendors.

Who are
relatively
incompetent
to purchase.

It is also a general rule of Equity, that no person "who by being employed or concerned in the affairs of another has acquired a knowledge of his property" (l), or who, in respect to the property to be sold, has a duty to perform which is inconsistent with the duty or interest of a purchaser (m), shall himself purchase such property; nor shall he purchase for himself in another's name; nor shall he himself purchase as agent for another (n); nor perhaps, even employ a third person to buy as agent for another (o). And where the same agent acts for two opposing parties, it must appear that the principals were placed at arm's length in the transaction (p). Where the rule depends upon legislative enactment, or is founded on general principles of public policy, it amounts to a prohibition: but where it is intended merely to protect the interests of individuals, the purchase, although *prima facie* voidable, may be sustained by evidence of those interests having been sufficiently guarded in the transaction.

Persons filling
fiduciary
character.

And in a recent case, (q) which well illustrates the principle which guides the Court in judging of the validity of such transactions, where A, a nephew of a former trustee of B's property, was commissioned by his uncle to advise and assist B in the settlement of his debts, and A and B met and consulted, it was held that this constituted such a fiduciary relation between A and B as rendered it incumbent on the former to communicate to the latter all material information

(i) *Sturges v. Joy*, 22 L. T. 82 Q. B.

(k) pp. 19, 20.

(l) Sug. 688; *Ahearne v. Hogan*, 1 Dru. 310.

(m) *Greenlaw v. King*, 3 Beav. 49; *Aberdeen R. Co. v. Blaikie*, 1 Macq.

H. L. C. 461; *Tate v. Williamson*, L. R. 1 Eq. 528; L. R. 2 Ch. App. 56.

(n) 9 Ves. 248; 10 Ves. 381.

(o) See 10 Ves. 393, and Sug. 690.

(p) *Hesse v. Briant*, 6 De G. M. & G. 623.

(q) *Tate v. Williamson*, *supra*.

~~Case 1.~~

~~Case 4.~~

which he acquired as to the value of B's property, and a sale from B to A was set aside on the ground of concealment.

Purchase by, although by auction, or by the Court, and though vendor separately advised.

A purchase coming within the rule is not rendered valid by the fact of its having been by auction (r), or under a Decree of the Court (s): or by the purchaser having had independent professional advice (t): nor, when a person by filling a confidential office has acquired a knowledge of property, is his capacity to purchase it restored by his retirement from office (u); for his knowledge remains.

Rule, in its more stringent form, affects purchases by Arbitrators:

The rule, in its more stringent form, applies to the several cases of

An arbitrator contracting for unascertained claims of parties to the reference (r)

Assignees:

An assignee or trustee of a bankrupt; against whom the rule is said to be more than ordinarily stringent (x); and it precludes a purchase by his partner on behalf of the firm (y): the Court has, however, on the petition of a purchasing assignee, directed a reference to inquire whether the purchase would be for the benefit of the estate, he paying all the costs (z); and, on the report being favourable, has confirmed the sale (a); it has also, under special circumstances, allowed an assignee to be removed, at his own request, in order that he might bid at the sale of the bankrupt's estate (b); where, however, an assignee, who was also second mortgagee of the property, applied for leave to bid, (remaining assignee,) the Court refused the application; but

(r) *Sug.* 691; 8 *Ves.* 349; *Randall v. Errington*, 10 *Ves.* 423; *Sanderson v. Walker*, 13 *Ves.* 601; *York Building Co. v. Mackenzie*, 8 *Bro. P.C.* 42; *Ingle v. Richards*, 28 *Beav.* 361.

(s) *Price v. Byrn*, cited 5 *Ves.* 681, and see *Cary v. Cary*, 2 *Sch. & L.* 173.

(t) *Tuke v. Williamson*, *supra*.

(u) *Ex parte James*, 8 *Ves.* 352; *Carter v. Palmer*, 6 *Cl. & F.* 657;

Spring v. Price, 10 *Jur. N. S.* 646; but see as to agents *Scott v. Dunbar*, 1 *Moll.* 442, *and qu.*

(i) *Blennerhassett v. Day*, 2 *Ba. & B.* 116.

(s) *Ex parte Lacey*, 6 *Ves.* 680 n.; *Ex parte Bennett*, 10 *Ves.* 395; *Ex parte Alexander*, 2 *Mon. & A.* 492; *Turner v. Trelawney*, 12 *Sim.* 49; *Pooley v. Quilter*, 2 *De G. & Jo.* 927; 4 *Drow.* 184.

(y) *Ex parte Burnell*, 7 *Jur.* 116.

(z) *Ex parte Gore*, 6 *Jur.* 1116; 3 *M. D. & De G.* 77.

(a) *S. C.*, 7 *Jur.* 126.

(b) *Ex parte Paine*, 3 *M. D. & De G.* 224.

allowed him to name a price at which he might take the property if not sold at the auction (c): and where a creditor's assignee, in another person's name, bought from a creditor, Vice-Chancellor Kindersley was of opinion that the validity of the sale depended on the vendor's believing that the purchase was made on behalf of the assignee, and directed an issue to determine the fact; but on appeal the transaction was declared wholly void, irrespectively of the vendor's belief (d):

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A Bishop purchasing an annuity to be charged upon a rectory; he being the person whose consent was required to the sale; although he gave a better price than could have been elsewhere obtained (e):

Bishop whose
consent was
required to
sale:

A Commissioner of bankrupts (f), although he had not acted (g), or had ceased to act in the prosecution of the fiat (h):

Commis-
sioners in
Bankruptcy:

Commissioners for Inclosure under the general Inclosure Act; who cannot purchase any land in a parish in which an Inclosure is made, until five years from the date and execution of their award (i); and a similar disability for the term of seven years affects valuers acting under the Commons Inclosure Act (k):

Commis-
sioners for
Inclosure:
and Valuers:

The Committee of a lunatic's estate; the Court has even refused to confirm a lease to the Committee, though approved by the Master as advantageous to the estate (l):

Committee of
Lunatics:

A member of a corporation, taking a lease of the corporate property (m):

Corporation
member of

(c) *Ex parte Holyman*, 8 Jur. 156.

(d) *Pooley v. Quilter*, 2 De G. & Jo. 327; 4 Drew, 184; see this case as to the duties of assignees in bankruptcy.

(e) *Greenlaw v. King*, 8 Beav. 49.

(f) *Ex parte Bennett*, 10 Ves. 381.

(g) *Ex parte Harrison*, 1 Buck. 17.

(h) *Ex parte Baynton*, 7 Jur. 244.

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(i) 41 Geo. III. c. 109, s. 2.

(k) 8 & 9 Vict. c. 118, s. 129.

(l) Shelf. on Lunacy, p. 446.

(m) *Att.-Gen. v. Corp. of Cusack*, 8 Dru. & W. 294; the lease was at a gross undervalue, and the property was trust property.

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A governor of a charity, taking a lease of the charity lands (n):

Governor of
charity:

Rector buying
glebe:

A rector, purchasing in the name of his curate, a portion of glebe sold for the redemption of the land-tax (o):

Solicitor to
flat:

A solicitor to a commission of, or fiat in, Bankruptcy, purchasing the estate from the commissioners (p): and a solicitor conducting a sale under a decree and purchasing the estate (q):

Trustees for
purchase:

A trustee whose duty it is to purchase particular property for his *cestui que trust*, (e.g.: a trustee of renewable leaseholds bound, if possible, to renew,) shall never buy it for himself; even though the proposed vendor positively refuse to part with it for the benefit of the *cestui que trust* (r): but the purchase if effected will be considered as made on their behalf (s); and any additional interest which the trustee acquires by purchase will belong to his *cestui que trust* (t): subject, of course, to the trustee being re-paid the purchase money:

And, in its
modified
form, affects
purchases by

And the rule, in its milder form, applies to the several cases of

Agents:

An agent for sale (u): except where the vendor is well

(n) *Att.-Gen. v. Lord Clarendon*, 17 Ves. 491.

(o) *Grorer v. Hugell*, 3 Russ. 428; but see *Beaden v. King*, 9 Ha. 499, 520.

(p) *Ex parte Bennett*, 10 Ves. 381; *Morse v. Roynl*, 12 Ves.; see p. 372, and see *Downes v. Grazebrook*, 3 Mer. 200; *et vide infra*, p. 37.

(q) *Owen v. Foulkes*, 6 Vest. 630, n; *Sidny v. Ranger*, 12 Sim. 118.

(r) *Ex parte Bennett*, 10 Ves. 395; see *Turner v. Trevelyan*, 12 Sim. 49; *Keech v. Sandford*, 1 Wh. & Tud. L. C. 32, and cases there cited.

(s) See *Tanner v. Thworthy*, 4

Beav. 487.

(t) *Fosbrook v. Baljuy*, 1 Myl. & K. 226; *Vaughton v. Noble*, 30 Beav. 34; where, however, the purchase was made out of trust moneys.

(u) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 40; *Woodhouse v. Meredith*, 1 Jac. & W. 204; *Brookman v. Rothschild*, 3 Sim. 153; *Rothschild v. Brookman*, 2 Dow. & C. 188; *Barker v. Harrison*, 2 Coll. 546; *Charter v. Trevelyan*, 11 Cl. & F. 724; *In re Bloyes' Trust*, 1 Mac. & G. 488; *et vide infra*, as to Solicitors and Agents.

aware from the first that his agent is beneficially interested in the purchase (x):

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An agent for the management of property; who can only purchase subject to the onus of proving that he afforded his principal all the knowledge respecting its value which he himself derived as agent (y):

An auctioneer employed to sell the property (z):

Auctioneers:

Counsel, purchasing, below their nominal value, charges upon his late client's estate (u), upon the validity of which he had advised:

A creditor of a bankrupt, who has been consulted by the assignees as to the best mode of selling the estate (b):

Creditor
advising on
sale:

Donee of a power of sale (c):

Donee of
power:

Executors and administrators, in respect to the personal estate of the deceased (d):

Executors
and adminis-
trators:

A guardian purchasing from his ward, immediately on his coming of age; although the price were adequate (e):

Guardians:

A mortgagee with a power of sale; who cannot purchase, under the power, either in his own name or through an agent,

Mortgagee;
buying under
power of sale:

(x) *Wentworth v. Lloyd*, 32 Beav. 467, affd., Dom. Proc. 10 Jur. N. S. 960.

(y) *Cane v. Lord Allen*, 2 Dow. 282; *Molony v. Kernan*, 2 Dru. & W. 31; *Chambers v. Betty*, Beat. 388; and see *Rossiter v. Walsh*, 4 Dru. & W. 485; *Murphy v. O'Shea*, 2 J. & L. 422.

(z) *Oliver v. Court*, 8 Pri. 127, 160; Sug. 488; *Baskett v. Cafe*, 4 De G. & Sm. 388.

(a) *Cartier v. Palmer*, 8 Cl. & F. 657; and a purchase by a solicitor's clerk from his principal's client, for whom

he had been professionally concerned, was set aside; *Holiday v. Peters*, 28 Beav. 349.

(b) *Ex parte Hughes*, 6 Ves. 617.

(c) See *Beaden v. King*, 9 Ha. 519.

(d) *Killick v. Flexney*, 4 Bro. C. C. 161; *Watson v. Toone*, 6 Madd. 153; *Baker v. Read*, 18 Beav. 398; *Smedley v. Varley*, 23 Beav. 358.

(e) See Sug. 691; and see *Oldin v. Sambourne*, 2 Am. 15; *Mulhallen v. Marum*, 3 Dru. & W. p. 317; *Archer v. Hudson*, 7 Beav. 560; *Dawson v. Massey*, 1 Ba. & B. 219, 282.

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or so arrange the transaction as to make himself the absolute owner (*j*): nor can his agent, who has acted in surveying the property and receiving the interest, purchase on his own account from the mortgagee (*g*): but the rule does not apply to a purchase of the equity of redemption by the mortgagee from the mortgagor (*h*); the purchase being from its inception a transaction subsequent to the loan (*i*); but if from the influence of his position he purchases at an undervalue, the sale may be set aside (*k*); nor does the rule apply to a purchase by a second mortgagee from a first mortgagee selling under his power of sale (*l*), even though the second mortgage may be in the form of a trust for sale (*m*): and on such purchase, if unimpeachable on other grounds, the second mortgagee acquires an irredeemable title, just as if he were a stranger (*n*).

Mortgagee
buying in
bankruptcy.

It was usual, although perhaps not strictly necessary (*o*), upon a sale under the general order in Bankruptcy, under the Act of 1849, for a mortgagee intending to bid, to apply for leave so to do (*p*): and by sect. 132 of the Act of 1861,

(*j*) *Robertson v. Norris*, 1 Giff. 421; Affd. on app. 4 Jur. N. S. 155; where redemption was decreed, though fifteen years had elapsed.

(*g*) *Orme v. Wright*, 3 Jur. 19; *In re Bloyes' Trust*, 1 Mac. and G. 488; and see *Downes v. Grazebrook*, 3 Mer. 200; *Robertson v. Norris*, 1 Giff. 421; on app. 4 Jur. N. S. 448.

(*h*) *Webb v. Rork*, 2 Sch. & L. 661, 673; and see *Waters v. Groom*, 11 Cl. & F. 684; *Knight v. Marjoribanks*, 2 Mac. and G. 10, and cases cited; *Dobson v. Land*, 8 Ha. 220; Sug. 689; *Gossip v. Wright*, 9 Jur. N. S. 592.

(*i*) *Infra*, Ch. VI.

(*k*) *Ford v. Holden*, L. R., 3 Eq. 461.

(*l*) *Parkinson v. Hanbury*, 1 Dr. & Sm. 142, 2 De G. J. & S. 450; *Kirkwood v. Thompson*, 2 H. & M. 392, 2 De G. J. & S. 613; *Shaw v. Bunn*, 33 Beav. 494; 2 De G. J. & S. 468.

(*m*) *Kirkwood v. Thompson*, *ubi supra*.

(*n*) A mortgagee cannot under the colour of a mortgage obtain a collateral advantage which does not strictly belong to the contract of mortgage, *Broad v. Selfe*, 9 Jur. N. S. 885.

(*o*) *Ex parte Ashley*, 1 Mon. & A. 82.

(*p*) See *Ex parte Marsh*, 1 Madd. 148; *Ex parte De Cane*, 1 Buck, 18. The costs of an application merely for leave to bid, are, it appears, allowed to the mortgagee only when the petition is presented at the request of the assignees; *Ex parte Coort*, 7 Jur. 864; *Ex parte Danks*, 12 L. J., N. S. 45; *Ex parte Smith*, 18 Jur. 1044. In *Ex parte Pedder*, 1 Mon. & A. 827, the Court, after the sale, allowed the mortgagee to bid, *nunc pro tunc*; see, also *Ex parte Yorke*, 3 M. D. & De G. 329.

any mortgagee, with the leave of the Court first obtained, might bid at any sale of the mortgaged property. The Act of 1869 does not contain a similar provision, but, even without express enactment, the Court has always had power to grant such leave (*q*); and the law in this respect remains unaltered. In the case of a legal mortgage, it appears to have been a common, although improper, practice, for the mortgagee to conduct the sale (*r*); in such a case, of course, he could not purchase without the permission of the Court, which permission would not be given except upon very special grounds (*s*).

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A mortgagor cannot purchase from his first mortgagee, selling under a power of sale, so as to defeat the title of his second mortgagee. Whether he would be similarly disqualified if the estate were first sold to a stranger, and then purchased from him by the mortgagor, appears to be considered doubtful (*t*); but it is conceived that such second sale could not be impeached, if it were a *bond fide* independent transaction.

Mortgagor
buying from
first mort-
gagee.

A tenant for life, with powers of sale and leasing, may sell or lease to a trustee for himself (*u*); and this doctrine has recently been extended to the case of a mortgagor with power of leasing until entry by the mortgagee (*x*).

Tenant for
life or mort-
gagor leasing
to a trustee
for his own
benefit.

The solicitor or agent of a person disqualified from purchasing, would, it is conceived, in general, be unable to purchase on his own account (*y*): but in a modern case, under special circumstances, the solicitor to a fiat was allowed to purchase part of the estate (*z*):

Solicitor of
disqualified
purchaser:

(*q*) *Ex parte Say*, 1 D. & C. 32.

(*r*) See *Ex parte Cuddon*, 3 M. D. & De G. 302.

(*s*) See *Ex parte McGregor*, 4 De G. & Sm. 603; *Bellamy v. Cockle*, 18 Jur. 465.

(*t*) *Otter v. Ld. Vaux*, 6 De G. M. & G. 638.

(*u*) *Wilson v. Sewell*, 4 Burr. Sugd. Pow. 7th ed.; App. p. 551.

(*x*) *Bevan v. Halgood*, 1 J. & H. 222.

(*y*) *Downes v. Grazebrook*, 3 Mer. 209; *Whitcomb v. Minchin*, 5 Mad. 91; *In re Bloyes' Trust*, 1 Mac. & G. 488; *Hesse v. Briant*, 6 De G., M. & G. 623; overruling *V. C. S.*, 2 Jur. N. S. 922; but see *Alvanley v. Kinaird*, 2 Mac. & G. 17.

(*z*) *Ex parte Watts*, 1 De G. 265.

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Steward :

A steward contracting for a lease from his employer ; to sustain which, he must show the fairness of the transaction (a) :

Trustees,

Trustees, unless merely such in name, can only purchase subject to special restrictions (b) : and there will be an additional objection to a purchase by a trustee, if the object of the trust were apparently to secure to the *cestui que trust* a continuing control over the property (c) :

who have
 accepted
 trust.

But, of course, the mere fact of a person having been named as a trustee will not affect his capacity to purchase, if he decline the trust *ab initio* ; and it is not essential that he should execute a deed of disclaimer (d) :

Security by
 way of trust
 for sale.

It seems probable that a person advancing money upon a security which takes the form of a conveyance to himself in trust to sell, instead of an ordinary mortgage, would for the purpose of the above rule be considered a mortgagee and not a trustee (e). If, however, the conveyance be to a third person, he is a trustee for both parties (f), and incurs the disability of a trustee.

Incompetent
 purchaser
 bound at
 option of
 parties
 interested.

But, in all the above cases, the transaction is binding on the purchaser (g) ; and voidable merely at the option of the parties originally interested in the property, or their representatives (h).

On the other hand—

(a) See *Lord Selkay v. Rhoades*, 2 Sim. & St. 49 ; 1 Bl. N. S. 1.

(b) As to which, *vide infra*, Ch. II., sect. 5.

(c) *Scott v. Davis*, 4 Myl. & C. 87, 90.

(d) *Stacey v. Elph*, 1 Myl. & K. 195.

(e) See *Waters v. Groom*, 11 Cl

& F. 684 ; *Dobson v. Land*, 8 Ha. 220 ; and see *Kirkwood v. Thomson*, 2 H. & M. 392 ; 2 De G. J. & S. 613.

(f) *Blennerhassett v. Day*, 2 Ball & B. 133.

(g) See *Sanderson v. Walker*, 13 Ves. 603.

(h) *Tate v. Williamson*, L. R. 1 Eq. 528 ; L. R. 1 Ch. Ap. 56.

An execution creditor may buy the property sold under the execution (i):

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Execution
creditor
may buy.

As to pur-
chases by
solicitors.

A solicitor is under no positive disability to purchase from his client where the relation does not exist between them in the particular transaction, and he deals with him at arm's length (k): yet where the confidential relation subsists, and the transaction is impeached, he must be able to prove its fairness; and that either the circumstances were such as not to impose upon him the duty of advising the client, or that he gave the client all the information respecting the subject of the purchase which he himself possessed, and advised him as diligently as he would or ought to have done, had the transaction been between the client and a stranger (l): and that the sale was as advantageous to the client as it would have been if the solicitor had used his utmost endeavours to sell the property to a stranger (m); but he need not have pointed out a merely speculative advantage, (such as the possibility of an unplanned, though contemplated railroad, running near the property,) which might be reasonably supposed to be equally in the knowledge of both parties (n): nor does the fact of the consideration having in part consisted of costs already incurred (o), or of a judgment vested in the solicitor (p), necessarily invalidate the transaction (o): although the mere fact of the client being indebted to the solicitor is an unfavourable feature in the case, on account of the additional

(i) *Stratford v. Twyman*, Jac. 418.

(k) *Johnson v. Peesemeyer*, 3 De G. & Jo. 13, 22; where the solicitor was an urgent creditor. See remarks of Lord Eldon, 2 Dow's Rep. 299.

(l) See *Holman v. Loynes*, 18 Jur. 839; 4 De G., M. & G. 270; *Barnard v. Hunter*, 2 Jur. N. S. 1213.

(m) *Denton v. Donner*, 23 Beav. 285.

(n) See *Edwards v. Meyrick*, 2 Ha. 60, where the earlier cases are cited and reviewed, and *Holman v. Loynes*, 18 Jur. 839; 4 De G. M. & G. 270; also *Ward v. Hartpole*, 3 Bl. 470;

Rudd v. Sewell, 4 Jur. 832, C.; *Thomas v. Phillips*, 11 Jur. 80; *Uppington v. Bullen*, 2 Dru. & W. 184, 187; *Bellamy v. Sabine*, 2 Ph. 425; *Salmon v. Cutts*, 4 De G. & S. 125; affirmed, 16 Jur. 623; *King v. Savery*, 1 Sm. & G. 271; *Savery v. King*, 2 Jur. N. S. 503; 5 H. L. Ca. 627; *Wright v. Vanderplank*, 2 Jur. N. S. 599; 2 K. & Jo. 1; *Cookson v. Lee*, 23 L. J. 473, Ch.

(o) *Edwards v. Meyrick*, *ubi supra*: *aliter* as regards future costs; *Uppington v. Bullen*, 2 Dru. & W. 184.

(p) *Spencer v. Topham*, 22 Beav. 573.

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influence which it must necessarily have created. So, too, the fact of the consideration being secured only by the solicitor's bond or covenant (q), or of the client being in embarrassed circumstances, and having no independent professional advice (r), are very material circumstances in judging of the validity of the transaction: and it has been held that a solicitor, taking a security from his client, must prove the actual advance of money by some other evidence than the instrument creating the security (s). And where the solicitor, who was himself the mortgagee, purchased the equity of redemption from his client, who had no separate legal advice, the conveyance was ordered to stand merely as a security for the money advanced, and the Court refused to import a power of sale into the transaction (t); and a solicitor will not be allowed as against his client to make a secret profit out of a transaction in which he is professionally concerned for him (u). But except in cases of undue influence resulting from other professional connections, the rule does not extend to prevent a purchase, by a solicitor, of his client's property in respect to which he has not been professionally employed (x); or to prevent his purchasing by auction his client's property if he have not acted for him professionally in respect to the sale (y). But when a solicitor has once advised upon an intended sale of his client's property, there is a difficulty in holding that any mere lapse of time can get rid of the fiduciary relation (z). The mere employment of another solicitor to peruse the draft conveyance on behalf of his client, no advice being afforded respecting the terms of the arrangement, will not be sufficient to validate the transac-

(q) *Waters v. Thorn*, 22 Beav. 547.

(r) *Gresley v. Mousley*, 4 De G. & Jo. 78.

(s) *Gresley v. Mousley*, 3 De G. F. & J. 433.

(t) *Pearson v. Benson*, 28 Beav. 538.

(u) *Bank of London v. Tyrrell*, 27 Beav. 278; 10 H. L. Cas. 26.

(x) 2 Y. and C. 529; 2 Ha. 6.

(y) *Austin v. Chambers*, 6 Cl. and F. 1; *Lawrance v. Galeworthy*, 3 Jur. N.S. 1049.

(z) See *Holman v. Loggan*, 18 Jur. 839, 842; *Gibbs v. Daniell*, 9 Jur. N. S. 636; *Lord Clarendon v. Hunsing*, 7 Jur. N. S. 1113; and as to voluntary gifts, *Trotter v. Judge*, 3 Drew. 306.

tion (a); and where a purchase by a solicitor from his late client is defended on the ground that the client had other professional assistance, it must be shown that the solicitor, who intervened, was fully informed as to the state of the vendor's affairs, and the value of the property (b). A subsequent gift of the property to the attorney by the client will not validate a previous voidable sale to the attorney, unless it is sufficiently clear that the client was aware of its voidability (c). Where the purchase is fair at the time when it is made, and the transaction is unimpeachable on other grounds, the mere circumstance of the solicitor having subsequently resold at a profit, is not material; and a trifling deficiency in value, such as may reasonably be considered an equivalent for immediate payment, and for the risk and expense of an ordinary sale, is not sufficient to invalidate the transaction (d).

The rule which disqualifies a solicitor from purchasing from his client, pending the relation between them in the particular transaction, applies also to his clerk, who has been professionally concerned for the client (e).

Purchase
by clerk of
solicitor.

The son or other relation of a trustee or other disqualified person, may purchase *bond fide* on his own account; and, although, when a trustee sells to a relation, the relationship is calculated to excite a suspicion, which, if confirmed by any other circumstance, it would require a very strong case to remove (f), the Court will, in the absence of fraud, even decree specific performance at the suit of the purchaser (g).

Relation of
disqualified
purchaser.

A tenant for life under a settlement, whose consent is

Tenant for
life on sale by

(a) *King v. Savery*, 1 Sm. and G. 271, 311; *Savery v. King*, 5 H. L. Ca. 627, 2 Jur. N. S. 508.

(b) *Gibbs v. Daniel*, 9 Jur. N. S. 636.

(c) *Waters v. Thorn*, 22 Beav. 547; where the gift was by will; and compare *Stump v. Gaby*, 2 De G. M. &

G. 623.

(d) *Spencer v. Topham*, 22 Beav. 573.

(e) *Hobday v. Peters*, 28 Beav. 349.

(f) See *Ferraby v. Hobson*, 2 Ph. 261.

(g) Sug. 692; See *Coles v. Trecothick*, 9 Ves. 234.

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Sect. 4

trustees with
his consent.

requisite to the exercise of a power of sale by the trustees, may, nevertheless, purchase from them under the power (h): but this is an avowed exception from the general rule; and was so decided by Lord Eldon, on the ground of its being dangerous to unsettle the practice of conveyancers (i); but, although the power of consenting to or requesting a sale by the trustees may be regarded as given to the tenant for life, for his own benefit, and not as constituting any fiduciary relation, he is not, it would seem, in the same position as a stranger as regards the absence of obligation to communicate what he knows respecting the value of the property (k).

As to purchase by
trustees.

A trustee may either simply, though expressly, hold the property in trust for others; or, although not nominally a trustee, he may yet owe duties to others in respect of it which invest him with a fiduciary character in the contemplation of the Court; or he may actually hold it in trust to effect a sale.

So his *cestui que trust* may be either *sui juris*, or the contrary,—as infants, married women, &c. &c.

Dry trustees
may purchase.

It does not appear that the rule against purchasing affects mere dry trustees; e. g.: a trustee to preserve contingent remainders (l), or (it is conceived) a trustee to bar dower, or of a term for years assigned to attend the inheritance, or of a mere outstanding legal estate, or, in fact, a trustee of any description who cannot possibly derive in the transaction any advantage from his fiduciary character (m).

Trustees for
sale.

It is often said that though an ordinary trustee may purchase trust property from his *cestuis que trust*, a trustee for sale cannot do so (n); but it is conceived that the true mean-

(h) *Howard v. Ducane*, Turn. & R. 81.

(i) Turn. and R. 86 and 87; 3 Russ. 432.

(k) *Dickenson v. Talbot*, L. R., 6 Ch. Ap. 32, 37, 38.

(l) 11 Ves. 226.

(m) See 1 Simps. 8. 567.

(n) *Denton v. Donner*, 23 Beav. 290; *Luff v. Lord*, 34 Beav. 220; and see *Franks v. Bollans*, L. R., 3 Ch. Ap. 717.

ing of the rule is, that a trustee for sale may not unite in himself the character and perform the functions both of buyer and seller; or, in other words, purchase from himself, instead of from his *cestuis que trust*. When the purchase is from the *cestuis que trust*, and the sale is not conducted, either directly or indirectly, by the trustee for sale, the transaction may stand; but in every dealing between *cestuis que trust* and their trustee, whether he is a trustee for sale or a mere ordinary trustee, the burden of proving the propriety of the transaction, and that no advantage was taken of the *cestuis que trust*, is thrown upon the trustee (*o*), and the relationship between them should, in respect at least to the subject matter of the transaction, be actually, or virtually, dissolved.

A husband may become a purchaser from his wife of property belonging to her (*p*).

Husband may
buy of wife.

Nor is a person who comes within the restrictive rule in its milder form, incapable of purchasing from his *cestuis que trust* or employers, &c., if they be *sui juris* (*q*); but, in any such case, the Court looks at the transaction with a jealous eye (*r*); and the question to be determined is, not whether the price is fair, but whether the purchaser, having held a confidential situation, previously to the purchase, has at the time of the purchase, shaken off that character, by the consent of the other parties, freely given, after full information, and has bargained for the right to purchase (*s*).

Purchase by
active trustees
from *cestuis que
trust*, when
valid.

So, where the sale by auction is in fact conducted by the *cestui que trust*, a purchase at an adequate price by the trustee for sale, may, perhaps, be supported (*t*).

Sale in fact by
cestui que trust.

In the case of a trust for the benefit of creditors, it is

Purchase by
creditors.

(*o*) *Luff v. Lord*, 34 Beav. 220.

(*p*) *Hewison v. Negus*, 16 Beav. 598.

(*q*) See *Coles v. Trecothick*, 9 Ves.

244; *Randall v. Errington*, 10 Ves. 426.

(*r*) *Davidson v. Gardner*, Sugd.

691; see *Murphy v. O'Shea*, 2 J. & L. 422, 429.

(*s*) See *Ex parte James*, 8 Ves. 353; *Denton v. Donner*, 23 Beav. 290.

(*t*) See *Coles v. Trecothick*, 9 Ves. 234, and compare *Ingle v. Richards*, 28 Beav. 361.

**Chapter I.
Trusts.**

trustee, with
consent of
majority,
invalid, *semble*.

Solicitor
cannot consent
for *cestui que*
trust.

Resignation
of trust
immaterial.

Secret
purchase.

Purchase
under decree.

Risk incurred
by disquali-
fied purchaser.

doubtful whether the consent of the majority will bind the minority, so as to render valid a purchase by the trustees for sale (u).

The solicitor of a *cestui que trust* has no general authority to authorize a purchase by the trustee (x).

A trustee cannot get rid of his incapacity by resigning the trust or confidential situation; for he would still retain the knowledge he had acquired while in office (y).

And the circumstance of a trustee or agent purchasing secretly in the name of a third person is indicative of fraud and the sale will, as a general rule, on that ground be set aside (z).

Where the *cestuis que trust* or any of them are not *sui juris*, a purchase by a trustee, who comes within the restrictive rule, can be safely effected only under an order of the Court; which order will not be made unless to the evident advantage of the trust (a); and it is presumed that he would have to pay the costs of the suit. A purchase by a trustee, made without this precaution, cannot be supported even by evidence of the best possible terms having been secured for the *cestuis que trust* (b).

We may next consider the nature of the risk incurred by the trustee or other person purchasing while under any incapacity of the second description.

(u) See Lord Eldon's remarks, 6 Ves. 628 (and see 630, n. (b)), on *Whelpdale v. Cookson*, 1 Ves. S. 9, cited in *Campbell v. Walker*, 5 Ves. 682; *Ex parte Beaumont*, 1 Mon. & Ayr. 304; and Sug. 692; but see also *Ex parte Bays*, 4 Madd. 459.

(x) *Davies v. Granbrook*, 3 Mer. 209.

(y) 8 Ves. 355; and see *Carter v. Palmer*, 8 Cl. & F. 557; *Spring v.*

Pride, 12 W. R. 492; 10 Jur. N. S. 646.

(z) *Lord Hardwick v. Vernon*, 4 Ves. 411; *In re Bloyes' Trust*, 1 Mac. & G. 497; *S. C. nomine, Lewis v. Hillman*, 5 H. L. C. 607, 630; *Ingle v. Richards*, 28 Beav. 361.

(a) See *Campbell v. Walker*, 5 Ves. 611; *Farmer v. Dixon*, 22 Beav. 327.

(b) *Aberdeen R. Co. v. Blaikie*, 1 Macq. H. L. C. 472; 2 Eq. R. 1236.

He may, on the requisition of any of his *cestuis que trust*—including in this general term all persons interested in the estate before the sale (c) and their representatives—be compelled,

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1st, To reconvey the estate, supposing he have not resold it (d):

He may be forced to reconvey;

Or, 2ndly, To let it be put up for sale, and to reconvey to another purchaser, if a better can be found; but if not, to keep it (e):

or let estate be resold;

Or, 3rdly, If he have resold it at a profit, to account for such profit (f):

or to account for profit if he has sold.

And a sub-purchaser or mortgagee, buying or lending with notice of the circumstances creating the incapacity in the original purchaser, is in the same predicament, if the original sale be impeached (g); although it seems probable that, if the case be merely that of an avowed purchase by a trustee from his *cestuis que trust*, a sub-purchaser or mortgagee would not be liable unless he had notice of circumstances rendering it voidable in Equity (h). In many doubtful cases, his security would practically depend upon his having the legal estate.

Sub-purchaser with notice is similarly liable.

In the first of the above cases, the purchaser will be credited with his original purchase-money and interest at £4 per cent., and all sums expended by him in substantial improvements (unless he have been guilty of actual fraud) (i),

Terms upon which reconveyance is decreed:
Accounts:

(c) See *Ex parte Morgan*, 12 Ves. 6.
(d) 6 Ves. 627; and see *Hamilton v. Wright*, 9 Cl. & F. 123.

(e) *Ex parte Reynolds*, 5 Ves. 707; *Ex parte Hughes*, 6 Ves. 617; *Randall v. Errington*, 10 Ves. 428.

(f) *Fox v. Macknath*, 2 Br. & C. 400, and cases cited in last note; the rule is the same although, as in the case of shares, stock, &c., similar property can be purchased; see *Brook-*

man v. Rothschild, 3 Sim. 153; *Rothschild v. Brookman*, 2 Dow. & C. 188.

(g) *Cookson v. Lee*, 23 L. J. 473, Ch.

(h) See Sug. 695.

(i) *Baugh v. Price*, 1 Wils. 320; see *Howell v. Howell*, 2 Myl. & C. 478; and *Turner v. Trclawny*, 12 Sim. 49.

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(as, in one case, buildings erected, and inclosures made) (*k*), or in repairs (*l*); and interest from the time of the advances; and will be debited with rents received by him, an occupation rent for any part occupied by himself (*m*), and his receipts for the sale of timber, &c., with interest; and also with the estimated amount of deteriorations (if any) (*n*).

In making the above estimates, buildings pulled down will, if incapable of repair, be valued as old materials, but otherwise as buildings standing (*o*).

If nothing be due to him, he must, of course, give up his purchase without receiving any further consideration (*p*).

Must reconvey
at once unless
decree gives
him a lien for
balance due.

Where the decree directs a reconveyance, and an account, and payment of the balance to the purchaser, but does not in terms give him a lien for such balance upon the estate, the reconveyance must be made at once, without waiting for the accounts (*q*). And a solicitor purchasing from his clients, who were trustees for sale, has been compelled to produce the title deeds before payment, although he alleged that the early title was defective, and on that ground resisted the exposure (*r*).

Must produce
deeds.

Terms of
resale.

The estate, if put up for resale, will be put up at the amount of balance due to the purchaser, ascertained as just mentioned (*s*), and, if there be no advance, he must keep the estate: in a modern case, where permanent improvements had been made, it was put up at its improved value, subject to the question whether he should be allowed the amount of such improvements (*t*).

(*k*) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C.; see pp. 56 and 71.

(*l*) *Ex parte Hughes*, 6 Ves. 617. Necessary repairs are allowed for, even in cases of fraud; 1 Wils. 322.

(*m*) *Ex parte James*, 8 Ves. 351.

(*n*) *Ex parte Bennett*, 10 Ves.; see p. 491.

(*o*) *Robinson v. Bidlev*, 6 Madd. 2.

(*p*) *Greenlaw v. King*, 3 Beav. 63.

(*q*) *Trevelyan v. Charter*, 9 Beav. 140.

(*r*) *Shallcross v. Weaver*, 12 Beav. 272; 2 H. & Tw. 281.

(*s*) *Vide suprà*, p. 45; *Ex parte Hughes*, 6 Ves. 617.

(*t*) *Williamson v. Seaber*, 3 Y. & C. 717.

In the case of a resale, the *cestuis que trust* cannot, if the estate were bought in one lot, insist on its being put up in several lots (*u*), nor, it is conceived, allotted otherwise than as it was bought; to effect the change they must take it off the purchaser's hands on the terms we have already mentioned (*x*).

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Estate not
re-allotted.

The third rule would extend to a purchaser who, by sale of wood, minerals, &c., had more than repaid himself his purchase-money, expenses, and interest (*y*); or who had made a similar profit by merely letting the property (which in the case of unexpected public improvements might often easily happen in the course of a few years, although the original price were perfectly fair); it is apprehended, that, in either of these cases, he would have, not only to reconvey, but also to pay the balance found due from him (*z*).

Purchaser
must account
for the
balance due
from him.

If, in any of the above cases, the purchaser has paid purchase-money into Court, and it has been invested, he will neither gain nor suffer by a rise or fall in the funds (*a*).

Variations
in funds on
payment into
Court.

Of course, if the *cestuis que trust*, on being made cognisant of the facts, decline to adopt the purchase, the trustee may retain the benefit of it, however advantageous it may be (*b*).

If *cestuis que
trust* decline,
trustee may
take the
benefit of the
purchase.

And, as a general rule, a trustee, though free from fraud, must pay the costs of a suit occasioned by his improper dealing with the estate (*c*): such is the almost invariable practice where the *cestuis que trust* are infants (*d*); in other cases, however, the rule is sometimes relaxed where the trustee is free from all moral blame (*e*); and in one instance it would seem that he was even allowed to receive a sum on account of costs (*f*).

Costs.

(*u*) 8 Ves. 351.

(*x*) *Supra*, p. 48.

(*y*) *York Buildings Co. v. Mackenzie*, 8 Bro. P. C., see p. 71.

(*z*) *S. C.*; and see 6 Ves. 622, and the decree in *Nelson v. Clarkson*, 2 Ha. 176; 4 Ha. 97.

(*a*) 8 Ves. 351.

(*b*) *Barwell v. Barwell*, 34 Beav. 371.

(*c*) Sug. 695.

(*d*) See *Sanderson v. Walker*, 13 Ves. 601.

(*e*) *Baker v. Carter*, 1 Y. & C. 250.

(*f*) See *Downes v. Grazebrook*, 3 Mer. 209.

Class I.
224. 1

Time allowed
for impeach-
ing sale.

Classes more
favoured than
individuals.

From what
period time
begins to run.

Mere lapse of time, except where it is a statutory or positive bar to relief, is only evidence of acquiescence (g): but a *cestui que trust* wishing to impeach a sale must do so within a reasonable time (h); which, as a matter of fact, is generally less than the time allowed by the Statute of Limitations (i): though independently of statutory limitation, no positive limit of time can be imposed, and each case must be governed by its own circumstances (k). A delay of eighteen years has been held to be an implied confirmation of the transaction (l): ten years have been allowed in the case of an individual (m); and twelve in the case of creditors (n): but the general tendency of modern decisions and of recent legislation is to increasingly discourage stale demands; and where there are other circumstances, shewing acquiescence, beyond the mere lapse of time, a short delay will be a sufficient bar to relief (o). A longer time, however, is allowed to a class of persons, e.g. creditors, than would be allowed to an individual (p).

And time will not run against a *cestui que trust* until he be *sui juris* (q), and aware that the trustee was improperly the purchaser (r): nor will it, in general, run against him, so long as his interest is contingent, or reversionary (s), or (in

(g) *Life Association of Scotland v. Siddall*, 7 Jur. N. S. 785.

(h) 1 Jac. & W. 59; *Lord Selkay v. Rhoades*, 1 Bl. N. S. 1; *Rudd v. Sewell*, 4 Jur. 882, C.; *Beaden v. King*, 9 Ha. 532; *Baker v. Read*, 18 Beav. 398; affirmed, 3 W. R. 118.

(i) See *Morse v. Royal*, 12 Ves. 374.

(k) Per L. J., *Turner in Grealey v. Mousley*, 4 De G. & Jo. 95.

(l) *Gregory v. Gregory*, G. Coop. 201; -Jac. 631; *Champion v. Rigby*, 1 Bam. & M. 589; *Purcell v. Kelly*, Best. 493, 501; *Harcourt v. White*, 28 Beav. 393; *Barwell v. Barwell*, 34 Beav. 375; *See also Scaum v. Knight*, L. R. 8 Eq. 396; varied on app. L. R. 2 Ch. Ap. 628.

(m) *Hall v. Noyes*, cited 3 Ves. 748.

(n) *Anon.*, cited 6 Ves. 632.

(o) *Wright v. Vanderplank*, 2 K. & Jo. 1; 7 De. G. M. & G. 597.

(p) *Whickhote v. Lawrence*, 3 Ves. 740; *York Buildings Co. v. Mackenzie*, 8 Bro. P. C. 42.

(q) *Lewin on Trusts*, 370; *Campbell v. Walker*, 5 Ves. 678, 682; *Randall v. Errington*, 30 Ves. 427; *Morse v. Royal*, 12 Ves. 373.

(r) *Chalmers v. Bradley*, 1 Jac. & W. 51; *Charter v. Treadwell*, 11 Cl. & F. 714.

(s) *Goutland v. De Faria*, 17 Ves. 20; *Duke of Leeds v. Lord Anstey*, 2 Ph. 117; *Bennett v. Colley*, 5 Sim. 161; *Brown v. Brown*, 1 Jo. & L. 178;

particular) dependent on the will of the purchasing trustee, or of a party implicated in the breach of trust (t): for in the former case he has no adequate motive for incurring the expense of attempting to impeach the sale, and in the latter he is under a direct inducement not to do so: but, though he is not bound to assert his title until it comes into possession, the mere circumstance of his interest being reversionary does not make him incapable of assenting to a breach of trust (u); and though the rule is, that the onus lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred, yet there may well be cases in which, from great lapse of time, such facts ought to be presumed (x).

It does not appear that his poverty is in itself an excuse for *laches* (y): although it would, probably, have an effect upon the Court if united with other circumstances (z).

A *cestui que trust* may confirm a voidable purchase by his trustee, &c.; but to make his confirmation binding, he must be *sui juris* (a), fully aware of the material facts (b), of his right to impeach the transaction (c), and of the legal consequences of his confirming it (d): he must be under no undue influence (e), the confirmation must be a solemn and deliberate act (f), free from any pressure resulting from the original

Confirmation
of voidable
purchase.

Roberts v. Tunstall, 4 Ha. 257; *Brown v. Cross*, 14 Beav. 105; *Hope v. Liddell*, 21 Beav. 183; *Life Association of Scotland v. Siddall*, 7 Jur. N. S. 785.

(t) *Roberts v. Tunstall*, 4 Ha. 257.

(u) *Life Association of Scotland v. Siddall*, 3 De G. F. & Jo. 58; and see remarks of L. J. Turner on judgment in *Brown v. Cross*, 14 Beav. 105.

(x) Per Lord Campbell in *Life Association of Scotland v. Siddall*, *ubi suprad.*

(y) *S. O.*

(z) *Gregory v. Gregory*, G. Coop. 201; and see *Oliver v. Court*, 8 Pri. 168.

(a) *Campbell v. Walker*, 5 Ves. 678, 682.

(b) *Chalmer v. Bradley*, 1 Jac. & W. 51; see *Wadderburn v. Wadderburn*, 4 Myl. and C. 41; *Skottowe v. Williams*, 3 De G. F. and Jo. 535.

(c) 1 P. Wms. 727; *Roche v. O'Brien*, 1 B. & B. 330, 340; *Denbar v. Tredennick*, 2 B. & B. 317; *Marker v. Marker*, 9 Ha. 16.

(d) *Cockerell v. Cholmeley*, 1 Russ. & M. 425; *Murray v. Palmer*, 2 Sch. & L. 486.

(e) *Lewin on Trusts*, §72.

(f) *Carpenter v. Heriot*, 1 Ed. 338; see *De Montmorency v. Devereux*, 7 Cl. & F. 188; *Salmon v. Outts*, 4 De G. & S. 125; affirmed, 16 Jur. 623; *Great Luxembourg R. Co. v. Magmay*, 25 Beav. 586; where pending a suit

transaction (*g*), and, in the case of a plurality of *cestuis que trust*, it must, to be effectual, be the act of all (*h*), as a majority cannot bind the minority; not even in the case of a public company, in respect to matters not so provided for by the deed of settlement (*i*).

A married woman may bind herself by acquiescence as regards her separate estate.

A married woman may, as regards her separate property, not subject to any restraint against anticipation, bind herself by acquiescence, just as if she were a *feme sole* (*k*); but whether she can do so when she is restrained from anticipation, appears to have been questioned. In one case (*l*), in which, however, it was not necessary to decide the point, L. J. Turner doubted whether the restraint against alienation would protect a married woman against the rules of the Court as to lapse of time and acquiescence; and after remarking that the fetter was imposed for her protection against her husband, and that it prevented her from disposing of her interest, stated that he was not prepared to say that it exonerated her from the obligation of asserting, within a reasonable time, any claim which she might be entitled to advance; but a married woman who is restrained from alienation is not merely protected against the acts of her husband, but is also generally precluded from disposing of her separate estate during the coverture; and to hold that she is capable of acquiescing in a breach of trust, which may lessen or prejudice her estate, seems inconsistent with the scope and working of the restraint on alienation. In one case (*m*), the protection afforded by this restraint has been carried so

impeaching the purchase by the trustee, the *cestuis que trust* sold the property. See also *Scottove v. Williams, ubi supra*.

(*g*) *Croze v. Ballard*, 3 Bro. C. C. 117; *Wood v. Downes*, 18 Ves. 128; *Wiseman v. Beake*, 2 Vern. 121; *Scott v. Davis*, 4 Myl. & C. 92; and cases cited *supra*.

(*h*) 6 Ves. 628; *Tomey v. White*, 3 H. L. C. 49.

(*i*) *Clay v. Rufford*, 5 De G. & S. 768.

(*k*) *Jones v. Hlygna*, L. R. 2 Eq.

538; the dicta of the M. R. in *Davies v. Holgson*, 25 Beav. 187, if meaning more than this, viz., that a married woman cannot impeach for her own benefit her own fraudulent act, are not reconcilable with the later authorities.

(*l*) *Derbishire v. Home*, 3 De G. M. & G. 80, 113; but see *Davies v. Hodgson, ubi supra*; *Clive v. Carew* 1 J. & H. 205.

(*m*) *Clive v. Carew*, 1 J. & H. 205.

far as to exempt the separate estate still in the hands of the trustees from liability to replace other separate estate comprised in the same settlement, and which the married woman had fraudulently disposed of.

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But in a case falling within the Married Women's Property Act, 1870 (*n*), the Court can, it seems, remove the restraint against alienation, so as to make the separate property of a married woman available for her antenuptial debts (*o*).

Power to dispense with the restraint under 33 & 34 Vict. c. 93.

We may lastly here remark, that conduct, or language, on the part of a *cestui que trust* who is *sui juris*, and which, had it occurred upon, or previously to, the commission of the breach of trust, might have amounted to acquiescence, and have precluded him from all right of complaint, may, if it occur subsequently to the breach of trust, be wholly insufficient to confirm the transaction, or to release the trustee from liability (*p*).

Acquiescence and confirmation distinguished.

(*n*) 33 & 34 Vict. c. 93, sec. 12.

123, and *Phillips v. Gatty*, 7 Ha.

(*o*) *Sanger v. Sanger*, L. R. 11 Eq. 470.

516; *Life Association of Scotland v. Siddall*, 3 De G. F. & J. 58.

(*p*) 5 Myl. & C. 218; and see 2 Ph.

Chapter II.

CHAPTER II.

AS TO SALES AND PURCHASES BY FIDUCIARY VENDORS AND PURCHASERS.

1. *As to the time for sale.*
2. *The manner of sale.*
3. *The consideration.*
4. *General points relating to sales by fiduciary vendors.*
5. *As to purchases by fiduciary purchasers.*

Sales by
fiduciary
vendors.

UNDER the term, fiduciary vendors, we may comprise agents for sale, assignees of bankrupts and insolvents, mortgagees with powers of sale, persons selling under the special authority of Railway and other Acts of Parliament, and, in particular, of the Lands Clauses Consolidation Act, 1845 (and who may be conveniently described by the general appellation of statutory owners (a)), and, lastly, trustees selling in pursuance of either an express trust or only a permissive power;—the term, trustees, being also held to include executors, when selling freeholds or copyholds in exercise of a power expressed or implied (b), and personal representa-

(a) As to the meaning of the word "owner" in the 76th sect. of the L. C. Act, see *Douglas v. L. & N. W. R. Co.*, 3 K. & Jo. 173. A person in possession, but showing a bad title, is not, but a surviving partner selling the property in the discharge of his duty to wind up the partnership is, an owner within that section; see *ex parte Freeman of Snyder* & 1 Drew. 184; and as to the power of statutory owners to sell and convey

easements and rights in, upon, or over land for the purposes of the Sanitary Acts, see 37 & 38 Vict. c. 89, s. 31.

(b) As to which see the late cases of *Moser v. Orr*, 7 Ha. 475; *Cornick v. Pearce*, 6. 477; *Affleck v. James*, 17 Sim. 121; *Currie v. Fullbrook*, 8 Ha. 25, connected, 278; *Haydon v. Wood*, 4. 279; *Wilson v. Bennett*, 15 Jur. 912, V.-C., K. B.; 16 Jur. 966, V.-C. P.; 5 De G. & S. 475; *Doe v.*

tives generally, when selling the chattels real of their testator or intestate.

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We may consider sales by such vendors, with reference to the proper time for and manner of sale, and to the price which should be obtained; and then refer to some points which cannot conveniently be classed under any of these heads.

Time, consideration for, and manner of.

Section 1.

(1). *The time for sale.*

Time for sale.

An agent for sale should, subject to a reasonable exercise of discretion, sell with all convenient speed.

By agents.

It was the duty of assignees of a bankrupt to sell without any unnecessary delay (e); and any single creditor might insist on a sale; and, if he so insisted, it was doubtful whether the Court could refuse its assent (d). Until creditor's assignees were chosen, the official assignee alone might sell under the order of the Court, if the Court considered that delay would be prejudicial to the bankrupt's estate: after creditor's assignees were chosen, the official assignee, under the Act of 1849, was not to interfere in directing the time or manner of effecting the sale (e): and a contract duly entered into by the creditor's assignees under the Act of 1849, was binding on the official assignee (f), and a *bond fide* sale by the creditor's assignee alone, without the concurrence of the official assignee, was upheld (g). But under the Act of 1861,

Assignees of bankrupts.

Hughes, 20 L. J. 148; 6 Exch. 223; *Mortimer v. Hartley*, 6 Exch. 47; 6 C. B. 819; *Mather v. Norton*, 21 L. J. 15, V.-C.P.; 16 Jur. 309; *Peppercorn v. Wayman*, 5 De G. & S. 230; *Brassay v. Chalmers*, 4 De G. M. & G. 528; *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Edyforth v. Armistead*, 2 K. & Jo. 383; *Wrigley v. Sykes*, 21 Beav. 337; *Hodgkinson v. Quinn*, 1 Jo. & H. 303; where there was both an express trust, and an implied power to sell;

Cook v. Dawson, 29 Beav. 123; and see now 22 & 23 Vict. c. 35, ss. 14, 18. See too *Hamilton v. Buckmaster*, L. R. 3 Eq. 323.

(c) *Ex parte Goring*, 1 Ves. jun. 169.

(d) *S. C.*; and see 6 Ves. 622; *Ex parte Miller*, 1 M. D. & De G. 44.

(e) 12 & 13 Vict. c. 106, s. 40; and as to estate of Insolvents petitioning under 5 & 6 Vict. c. 116, see 7 & 8 Vict. c. 96, s. 10.

(f) *Hughes v. Morris*, 9 Ha. 636.

(g) *Re Ward's Legacy*, 26 Beav. 207.

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upon the appointment of the creditor's assignee, all the estate, both real and personal, of the bankrupt was divested out of the official assignee, and vested in the creditor's assignee, who thenceforth had the sole management of it, except as to debts under £10 (*h*).

**Assignees of
Insolvent.**

It was the duty of an assignee of an insolvent, under the 1 & 2 Vict. c. 110, in the absence of special direction by the Court, to sell the real estate, if practicable, within six (lunar) months after his appointment (*i*); but a sale was not necessarily invalid by reason of its being made after such period had elapsed (*k*). The insolvent's leaseholds for years formed part of his "estate and effects," and not of his "real estate," and were therefore to be sold merely "with all convenient speed" (*l*); but the laws relating to the relief of insolvent debtors have been repealed, and the Insolvency Court abolished, and all debtors, whether traders or not, are now subject to the bankrupt law (*m*).

**Trustee under
the recent
Bankruptcy
Act.**

Under the Bankruptcy Act, 1869 (*n*), the creditors are to appoint a trustee of the bankrupt's property, and also a committee of inspection to superintend his administration of it (*o*): and upon the appointment of the trustee the debtor's property passes to, and becomes vested in, him (*p*); and he has wide powers of sale and management (*q*).

Mortgagees.

A mortgagee, with a general power of sale, may sell without waiting for the concurrence of the mortgagor; nor does a stipulation in the mortgage deed that the mortgagor shall, if required, join in any sale, entitle a purchaser to require his

(*h*) 24 & 25 Vict. c. 134, ss. 117, 118, 123.

(*i*) Sec. s. 47, and see p. 53 n. (*e*).

(*k*) *Mather v. Priceman*, 9 Sim. 352; *Cole v. Cole*, 6 Ha. 517; and see *Dee v. Evans*, 1 Cr. & M. 450.

(*l*) *Waldron v. Howell*, 3 Russ. 376; and see 53 Geo. III. c. 102, s.

19, and 1 & 2 Vict. c. 110, ss. 47, 50.

(*m*) 24 & 25 Vict. c. 134, sect. 69.

(*n*) 32 & 33 Vict. c. 71.

(*o*) Sect. 14; those provisions seem imperative; as to meaning of the word property, see sect. 4.

(*p*) Sect. 17.

(*q*) Sects. 23; 27.

concurrence (r). The Trustees and Mortgagees Act (s) provides that where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any assurance, which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge, have (among other powers) a power to sell, or concur with any other person in selling, the whole or any part of the property subject to the charge, by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, and to resell the property from time to time in like manner; but six months' notice in writing must be given before such power of sale is exercised (t): and the Act contains certain ancillary provisions as to the application of sale moneys, and the appointment and duties of a receiver. The object of this statute was to dispense with the necessity of inserting a power of sale in every mortgage, by making such a power incident to the estate or interest of the mortgagee or owner of the charge: but partly because no statutory form can be made sufficiently elastic, so as perfectly to adapt itself to the requirements of each particular case, and partly because its provisions are not so beneficial or comprehensive as those of a similar nature which are commonly inserted in mortgages, this statute is seldom relied on, except in cases where the mortgage debt is so small that the expense of the transaction is of material moment; or perhaps where a person, who has merely a memorandum of charge, is desirous of effecting a sale of the property. It must, however, be borne in mind that unless negatived by

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Their power
to sell under
Lord Cran-
worth's Act.

(r) *Corder v. Morgan*, 18 Ves. 344. sect. 11.

(s) 23 & 24 Vict. c. 145, part 2, (t) Sect. 13.

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express declaration, or rendered inapplicable by the actual frame of the deed (u), these provisions apply to every mortgage executed after the passing of the Act (x). The Act does not apply to mortgages of, or so far as they affect, mere personal chattels or choses in action.

Mortgagees
power of
sale how not
extinguished.

When a mortgagor and mortgagee with a power of sale, concurred in demising to a trustee, for the purpose of granting building leases at the request of the mortgagee, during the continuance of the security, and of the mortgagor when the debt was satisfied, and the demise was not expressly made subject to the power of sale, it was held that the power of sale was not extinguished, and that the concurrence of the mortgagor was not necessary to make a good title (y). Where a mortgagee with a power of sale submortgages with a declaration that the submortgagee may exercise the power, it has been doubted whether the power of sale in the original mortgage is not destroyed by the transfer (z). The better opinion seems to be that it is only suspended, and upon a simple transfer by way of submortgage, is exercisable by the transferee.

Statutory
owners.

Statutory owners must, of course, sell within such limits (if any) as to time as are prescribed by the Act under which they derive their powers. The Lands C. C. Act, 1845, seems to impose no restriction as to time upon the purchase of lands by agreement; although it limits the time for compulsory purchases by the company to a period of three years from the passing of the special Act, unless some other period be therein prescribed (a); and it would seem that, in the absence of restriction, even a compulsory power could be exercised without reference to lapse of time (b):

(u) Sect. 32.

(x) Sect. 34. The Act came into operation on the 29th Aug. 1860.

(y) *King v. Henson*, 3 De G. M. & G. 390.

(z) *Cruce v. Nottell*, 2 Ex. N. S. 523.

(a) L. C. C. Act, 1845, s. 122.

(b) *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 472. A railway company cannot, it seems, exercise its compulsory powers when it is evident that the entire line cannot be com-

but a railway company having found their original undertaking impracticable cannot, it seems, exercise their compulsory powers in respect only of part of the proposed scheme. (c). It is sufficient if the company, within the limited period, give notice of their intention to take the lands, and summon a jury to assess their value (d); or merely give notice and take possession, in which latter case it rests with the landowner to have the value ascertained (e); or give notice and deliver the usual bond (f), or even merely give notice (g); but if, after giving notice, they neglect to take the necessary steps for summoning a jury, the issue of the warrant to the sheriff may be enforced against them by a mandamus under the C. L. Procedure Act, 1854 (h). A contract in anticipation of the special Act, which subsequently confers the power of sale, is binding on the company (i): but it has been held that the company, after incorporation, are not bound by the agreement of the promoters with the landowner, unless they expressly, or by acts, adopt it as their own (j).

Statutory
notice.

pleted; see *Gray v. Liverpool and Bury R. Co.*, 9 Beav. 391; *Cohen v. Wilkinson*, 12 Beav. 125, 138; 1 Mac. & G. 481.

(c) *Gray v. Liverpool & Bury R. Co.* 9 Beav. 391; *Cohen v. Wilkinson*, 12 Beav. 125, 138; 1 Mac. and G. 481.

(d) *Brookbank v. Whitehaven Junction R. Co.*, 15 Sim. 632; 5 Ry. Ca. 373; and see *Reg. v. Birmingham and Oxford Junction R. Co.*, 15 Q. B. 634, affirmed, 647; *Worsley v. South Devon R. Co.*, 15 Jur. 970; *Burkinshaw v. Birmingham, &c. R. Co.*, 5 Exch. 487.

(e) *Doe v. North Staffordshire R. Co.*, 16 Q. B. 526; 15 Jur. 945, Q. B.; and see *Doe v. Leeds & Bradford R. Co.* *ib.*, 246; 16 Q. B. 796; *Inge v. B. W. & S. F. R. Co.*, 3 De G. M. & G. 653.

(f) *Sparrow v. O. W. & W. R. Co.*, 2 De G. M. & G. 94.

(g) *Lord Salisbury v. Gt. N. R. Co.*, 17 Q. B.; 3 El. and Bl. 443; *Edinburgh*

and *Dundee R. Co. v. Leven*, 1 Macq. H. L. C. 284.

(h) *Fotherby v. Metrop. R. Co.*, L. R. 2 C. P. 188.

(i) *Hawkes v. Eastern Co. R. Co.*, 3 De G. & S. 743; 1 De G. M. & G. 737; and affirmed, 5 H. L. Ca. 331, *In The Manchester &c., R. Co. v. Gt. N. R. Co.*, 9 Ha. 284, a question arose, but was not decided, as to the effect of two special Acts conferring on different companies the right of compulsorily purchasing the same land.

(j) *Preston v. Liverpool R. Co.*, 5 H. L. Ca. 605. See, too, *Williams v. St. George's Harbour Co.*, 24 Beav. 339; reversed on app., but on the ground that the Company had adopted the contract; 2 De G. and Jo. 547. See also as to the power of the projectors to bind the Company, *Caledonian, &c., R. Co. v. Mayor of Helensburgh*, 2 Jnr. N. S. 695; 2 Macq. 391; and as to the personal liability of those who

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Trustees for
 sale.

Trustees for sale are not, by the usual direction to sell "with all convenient speed," precluded from exercising a reasonable discretion as to the time of sale; nor need one co-trustee adopt the opinion of another (*k*); but in cases of clearly improper delay they will be responsible for any consequential loss to the estate (*l*). A direction to sell with all reasonable expedition and within a specified time, does not preclude a sale after the expiration of such period, or incapacitate the trustees from making a good title to a purchaser; but as between themselves and their *cestuis que trust* (*m*), the onus of shewing that the *cestuis que trust* are not prejudiced by the time for sale being extended, is thrown upon the trustees, unless the Court relieves them of the trust, or authorizes the delay (*n*); and where a sale has been postponed until long after the time at which it apparently ought to have been effected, a prudent purchaser should ask for some explanation of the delay (*o*). For the purpose of determining the relative rights of tenants for life and remaindermen, twelve months will be considered a reasonable period within which to execute a trust to sell or purchase "with all convenient speed" (*p*), or, "so soon as conveniently may be" (*q*); and this although the property be a reversion (*r*). Where trustees are directed to sell "with all convenient speed," or "so soon as conveniently may be," but the time for sale is left entirely to their own dis-

profess to contract for the company, see *Kelner v. Baxter*, L. R. 2 C. P. 174; *Scott v. Lord Ebury*, *ib.* 255.

(*k*) *Buxton v. Buxton*, 1 Myl. & C. 80; but see *Taylor v. Tabrum*, 6 Sim. 281. It has been held, by Shadwell, V.-C. that surviving trustees can make a good title and receive the purchase-money, although the trust-instrument directs any vacancy to be filled up within a specified time which has elapsed; *Warburton v. Sandys*, 14 Sim. 622; *sed qu.*

(*l*) *Pittenden v. Halsey*, 22 L. J. Ch. 697; *Cuff v. Hall*, 1 Jur. N. S. 972; *Deayne v. Robinson*, 21 Beav. 86; *Fry v. Fry*, 27 Beav. 144.

(*m*) *Pearce v. Gardner*, 10 Ha. 287; *Cuff v. Hall*, 1 Jur. N. S. 972; and see *Witchot v. Zouch*, 1 Ch. Ca. 97; 10 Ha. 288.

(*n*) *Cuff v. Hall*, 1 Jur. N. S. 972.

(*o*) *Stroughill v. Austey*, 1 De G. M. & G. 635; and see judgment in *Deayne v. Robinson*, *supra*.

(*p*) *Parry v. Warrington*, 6 Mad. 155; *Vickers v. Scott*, 3 Myl. & K. 500; and cases cited in *Elwin v. Elwin*, 8 Ves. 547.

(*q*) *Grisdley v. Lord Chesterfield*, 13 Leav. 288; but see cases cited in *Elwin v. Elwin*, 8 Ves. 547.

(*r*) *Wilkinson v. Duncan*, 23 Beav. 471.

cretion, they may not arbitrarily postpone the sale for an indefinite period; especially in cases where such postponement may have the effect of varying the relative rights of tenants for life and remainderman (s); and in one case (t), where trustees, having a discretion, allowed a reversionary interest in a fund to remain unsold for nineteen years, when it fell into possession, the tenant for life, who had received nothing, was held entitled to be recouped, out of the fund, the difference between the amount when it fell into possession and the value of the reversion at the end of a year from the testator's death, calculated on the assumption, that it would fall into possession on the day when it actually did fall in.

It has been said that, in the absence of any special direction, trustees for sale should, subject to a reasonable exercise of discretion, sell with all convenient speed (u): but in practice, trustees of a will or settlement are not generally considered bound under the ordinary trust for sale, nor is it usual for them to sell, except upon the request of some one or more of their *cestuis que trust*, or under circumstances which render a sale necessary or expedient (v); or unless the property is not of a permanent character. And as respects the time of sale, greater latitude may, it is conceived, be allowed where the trust for sale is contained in a settlement, than where it is conferred by a will; for in the former case, the trust is frequently introduced merely for the convenience of declaring the beneficial trusts, and not with any intention of an immediate or early sale of the property. The like distinction may also be held to exist between the case of a trust

Whether
bound to sell
immediately.

(s) *Walker v. Shore*, 19 Ves. 391; *Fry v. Fry*, 27 Beav. 144.

(t) *Wilkinson v. Duncan*, 23 Beav. 469; in this case it was considered that the trustees had properly exercised their discretion, but that it was not to prejudice the tenant for life.

(u) Sug. 62.

(v) Dav. Conv. iv. 30: if after request, the trustees unreasonably delay the sale, this will not affect the relative rights of the *cestuis que trust*; see *Leckmere v. Earl of Carlisle*, 3 P. Wm. 215; *Walker v. Shore*, 19 Ves. 391; *Caldecott v. Caldecott*, 6 Jur. 232; *Greisley v. Lord Chesterfield*, 13 Beav. 294.

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Sales.

(whether in a deed or will) to sell for the purpose of raising a specified sum, and that of a trust to sell for the mere purpose of a division of the proceeds among a class of beneficiaries. After a bill is filed for the administration of the trust, trustees cannot sell without leave of the Court (*w*): it has, however, been held by the Court of Queen's Bench, that the power of an executor to make a good title to the chattels real of the testator is not affected by the existence of an administration suit, so long as there is no decree (*x*); and it would seem that in a creditor's suit an executor may, with leave of the Court, exercise the power of sale which is implied from a charge of debts (*y*).

Executors
selling under
implied power
of sale.

Greater latitude as to the time for selling is given to executors, who sell under a power of sale implied from a charge of debts, than would be allowed to ordinary trustees for sale; and though it is only right that a purchaser should be fully protected, it may be doubted whether the authority of executors to sell in such a case has not been prolonged beyond reasonable limits. Thus in one case (*z*), a sale by executors thirty-three years after the death of their testator, for the purpose, as they alleged, of paying his debts, was enforced against the purchaser; and in a later case (*a*), although twenty-seven years had elapsed since the testator's death, and nine years since the death of the executor, it was held that the executors of the original executor could make a good title under the implied power of sale; and further that they were not bound to answer the inquiry of the purchaser, whether any debts still existed which rendered a sale necessary.

Remarks on
Sabin v.
Heape.

It may be here remarked, with much deference to the eminent judge who decided this case, that the latter branch of the decision, although avowedly based upon *Forbes v.*

(*w*) *Walker v. Bushwood*, Amb. 676.

B. 576.

(*x*) *Moses v. Barrett*, 14 Q. B. 504,
and *qu.*; and see *Maltby v. Russell*,
2 Sim. & St. 227.

(*y*) *Wrigley v. Sykes*, 21 Beav. 287.
See Sugd. Pow. 8th ed. p. 121.

(*z*) *Sabin v. Heape*, 27 Beav. 552.

(*y*) *Bolton v. Stannard*, 4 Jur. 21.

Peacock, 1 Phill. 717, is really untouched by that authority. In *Forbes v. Peacock* there was no doubt that the vendor, a sole surviving executor and trustee for sale, could sell and convey; the only question was whether he could give a good discharge for the purchase-money: and it was held, and perhaps properly held, that the charge of debts indicated an intention on the part of the testator that the trustees' receipt should, under all circumstances, be a good discharge to a purchaser, and, inasmuch as the existence or non-existence of debts was immaterial, the vendor was held not bound to answer the purchaser's inquiry on the point. In *Sabin v. Heape*, the validity of the sale itself, at least as between the vendor and the devisees of the estate, depended upon the existence of debts. Unless the vendor knew or believed that debts existed, he was committing a fraud in selling the property; and although it may be admitted that the purchaser was not entitled to *evidence* of the existence of debts, it may yet be doubted whether, especially under the suspicious circumstances of the case, he had not a right to be assured that the vendor was professedly selling for the only purpose which could warrant a sale; and whether, even assuming (which may be also doubted) that he could have safely omitted to make the inquiry, the refusal to answer it when made was not implied notice that no debts existed. The general rule is conceived to be, that a vendor, not protected by condition, is bound, to the extent of his personal information and belief, to answer *any* question put to him by the purchaser, the answer to which may elicit matter affecting the title; and the decision in *Sabin v. Heape*, so far as it may appear to impugn this rule, and even its entirety, should, it is respectfully submitted, be acted upon with much caution in actual practice.

Trustees of a mere power of sale with the usual trusts for re-investment in real estate, ought not to sell except for some good reason (b); the Court, however, will not control a *bond fide* exercise of their discretion (c); but a sale by a trustee,

Trustees
under power
of sale.

(b) See 10 Ves. 309; *Watts v. Girdlestone*, 6 Beav. 188; Sug. 70.

(c) Sug. Pow. 8th ed. 601; *Marshall v. Stadden*, 7 Ha. 428; 4 De G. & S.

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after a *cestui que trust* has become absolutely entitled to the property, is *prima facie* invalid (*d*).

May not sell
when objects
of trust are
satisfied.

Trustees ought not to sell after the objects of the trust are satisfied, even where their power of sale is not confined to the continuance of the trust; nor, where it is so restricted, can they exercise it after the time when, but for their own default, the trust ought to have been completed (*e*). In one case, where the limitations of the settlements were exhausted, with the exception only of a jointure secured by a term which was still subsisting, a power of sale, exerciseable with the consent of the person entitled to the rents, was held to be extinguished (*f*). Where an estate was devised to trustees for different persons in specified shares, some of the beneficiaries being entitled absolutely, while the shares of others were settled upon trusts for their benefit, and the trustees had an unlimited power of sale over the whole estate, it was held that this power might be exercised so long as the trusts of any of the shares remained unperformed (*g*).

Fictitious
sale by, set
aside.

Where a transaction, apparently a sale under the ordinary power, was, in fact a mere contrivance to raise money for the purpose of its being advanced to the tenant for life, under a power of advancement in the settlement, it was set aside as a fraud upon the power of sale (*h*).

Time fixed
by author
of trust
cannot be
anticipated.

When the instrument creating the trust fixes the time for sale, this cannot be anticipated either by the trustees or the Court, however injurious the delay may be to the estate: *e.g.*;

468. As to the validity of indefinite powers of sale, with reference to the rule against perpetuities, see *Wood v. White*, 4 Myl. & C. 460; *Nelson v. Callow*, 15 Sim. 353, and cases cited; *Cole v. Sewell*, 4 Dru. & W. 432; 1 Jarm. Wills, 3rd ed. 237: there seems to be little or no doubt of their validity.

(*d*) *Jefferson v. Tyrer*, 9 Jur. 1083, V.-C. S. And see *Wright v. Wyche*,

2 Drew. 318; *Lantsbery v. Collier*, 2 K. & Jo. 709.

(*e*) *Wood v. White*, 2 Keen 664; *Lewin* 433.

(*f*) *Wolley v. Jenkins*, 25 Beav. 53 affd. on app. *ib.* 63.

(*g*) *Tait v. Swinestead*, 26 Beav. 525.

(*h*) *Robinson v. Briggs*, 1 Sm. & G. 183.

where a testator directed an advowson to be sold upon the death of A., the incumbent, the Court held that it had no jurisdiction to sell in A.'s lifetime, although upon his death it would be necessary to present a new incumbent before any sale could be effected (i); and where trustees, with the consent of the tenant for life and of some of the *cestuis que trust*, attempted to sell in anticipation, they were not allowed costs of the attempted sale and litigation, as against the *cestuis que trust* who were under disability (j). But notwithstanding an imperative direction to sell, trustees may, with the sanction of the Court, postpone a sale, where strict compliance with the terms of their trust is clearly disadvantageous to the parties beneficially interested (k).

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May be
postponed,
when.

The ordinary power of sale and exchange may, it seems be accelerated by the surrender of a prior life interest, for, this does not prejudice the estate of the remainderman, but only changes the nature of the property; but where powers of charging are limited to successive tenants for life when in possession, the power given to a tenant for life in remainder must await the regular determination of the previous limitations, and cannot be accelerated by the surrender of a prior life interest (l).

Acceleration
by surrender
of prior
interest.

On the other hand, where a settlement of a reversion, in terms authorised a sale at any time with the consent of the tenant for life under such settlement, it was held that the trustees might proceed to an immediate sale, although its effect would be, under the trusts declared of the purchase-money, to vary the rights of the *cestuis que trust* by giving such tenant for life an immediate income (m).

Reversion
may be sold
to prejudice
of remainder-
man under
express power.

(i) *Johnston v. Baber*, 8 Beav. 233; see *Blacklow v. Laws*, 2 Ha. 40; *Gosling v. Carter*, 1 Coll. 652.

(j) *Leedham v. Chawner*, 4 K. & Jo. 458.

(k) *Morris v. Morris*, 4 Jur. N. S. 802.

(l) *Truell v. Tyson*, 21 Beav. 437.

(m) *Clark v. Seymour*, 7 Sim. 67; and see *Tasker v. Small*, 6 Sim. 625; *Blackwood v. Borrowes*, 4 Dru. & W. 441; *Giles v. Homes*, 15 Sim. 359; *Minet v. Leman*, 20 Beav. 269; 7 De G. M. & G. 340, 351.

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Power to
convert, &c.,
should be
exercised for
general
benefit.

But trustees, in exercising discretionary powers of changing the nature of the trust estate, ought not to be influenced by any desire to benefit one *cestui que trust* at the expense of another (n): and if one of several *cestuis que trust*, e.g. a tenant for life, having an absolute irresponsible discretionary power of giving or withholding his consent to a sale by the trustees, become himself a trustee, he is thereby precluded from withholding or giving his consent to a sale, with a view more to his own interest than to that of the other beneficiaries (o). Where there is a tenant for life without impeachment of waste, trustees of powers of sale and exchange should be particularly careful not so to exercise them as to enable him to take undue advantage of his rights in respect to timber and minerals.

Conditional
powers of
and trusts
for sale.

Subsequent
and precedent
condition.

Powers of and trusts for sale are often exercisable only under certain specified conditions: when this is the case, and a sale is made in breach of a condition, the purchaser's safety seems to depend upon the following considerations, viz.: 1st, whether the condition is subsequent or precedent; and, 2ndly, whether it affects the title to the legal estate. If it affect merely the equitable title, an apt declaration in the instrument creating the trust or power will protect a purchaser against the non-performance of a precedent (p), and *à fortiori*, of a subsequent condition; as in the case of an ordinary power of sale in a mortgage, which usually contains a precedent condition that certain notices shall have been given, and defaults made in payment, but with a declaration relieving purchasers from liability for a breach of such condition. If, on the other hand, the exercise of a power is to affect the legal estate, as where land is limited in strict settlement, and a power is given to trustees, in certain specified events, to sell, and, for that purpose, to revoke the old and appoint new uses, ~~here~~ unless the required events occur, the old limitations remain unaffected,

(n) *Raby v. Ridsdale*, 1 Jur. N. S. 363; 7 De G. M. & G. 104; 5 Eq. R. 201.

(o) *Lord v. Whitwick*, 4 De G. M. & G. 808.

(p) *Sug. Pow.*

notwithstanding any attempted exercise of the power; and any declaration that purchasers shall not be bound to see that the events have happened, would, it is conceived, be inoperative (q).

Chap. II.
Sect. 1.

The usual clause in mortgage deeds that a purchaser shall not be bound to inquire as to the propriety or regularity of the sale, and that notwithstanding any impropriety or irregularity, the same shall, so far as he is concerned, be deemed to be within the power, though it relieves him from the obligation to inquire, does not protect him if he has notice of anything which throws a doubt upon the validity of the sale (r).

(2). *Manner of sale.*

Section 2.

An agent or trustee, simply authorized to sell by public auction, either generally or even for a specified sum, cannot, whatever price be offered, sell by private contract (s); but in one or two recent cases, after an abortive attempt to sell by public auction, subject to a reserved bidding, a sale by the trustee or agent by private contract at the reserved price has been upheld, and the title has, under special circumstances, been forced on the purchaser (t).

Manner of
sale.
Power to sell
only by
auction,

And an express authority to sell by private contract, would not, it is conceived, justify a sale by auction (u); unless the authority were to sell for a specified sum, and the price obtained at the auction (after payment of the incidental expenses) exceeded or equalled that amount. Nor does an authority to sell to A. for a specified sum, necessarily

or only by
private
contract.

(q) See *Doe v. Martin*, 4 T. R. 39; *Watkins v. Williams*, 16 Jur. 181; 21 L. J., Ch. 601; *Ferrand v. Wilson*, 4 Ha. 385; and a singular case of *Hougham v. Sandys*, 2 Sim. 95, 145; and see, as to the construction of discretionary trusts for sale, *Lord Rendlesham v. Meux*, 14 Sim. 249; *Bird v. Fox*, 11 Ha. 40.

(r) *Jenkins v. Jones*, 6 Jur. N. S. 391; *Parkinson v. Hanbury*, 1 Drew. &

Sma. 143; and see *Ford v. Heely*, 3 Jur. N. S., 116.

(s) *Daniel v. Adams*, Amb. 495; *In re Loft*, 8 Jur. 206, C.; Sug. 56, *et seq.*

(t) *Else v. Barnard*, 28 Beav. 228; *Bousfield v. Hodges*, 33 Beav. 90; *Set qu.*

(u) See and consider *Daniel v. Adams*, Amb. 495.

Chap. II.
Trusts.

To A. does not authorize sale to B.

As to trusts created since 28th August, 1860.

justify a sale to B. for that (or, it is conceived, any greater) sum (y).

In all cases, where by any will, deed, or other instrument of settlement, executed or, in the case of a will or codicil, revived since the 28th August, 1860, it is expressly declared that trustees shall have a power of sale over hereditaments, they may, unless the trust instrument directs the contrary, sell either by public auction or private contract, as they deem most advantageous (x). Whether this provision is applicable to a case where there is an imperative trust for sale, may be doubted; and the point has not yet been decided (y).

Sale by estate agent.

An ordinary estate agent who has not been instructed as to what conditions as to title, &c., are necessary in respect of the estate for which he has been instructed to find a purchaser at a specified price, is not justified in signing an absolute contract on behalf of the owner (z).

Sale by assignees of bankrupt;

The assignees of a bankrupt might, although they incurred some risk in so doing, sell by private contract (a); and they were justified in selling in lots (b); but without the sanction of the creditors they might not buy in on a sale by auction (c), and under the general order in bankruptcy it was for the assignees, and not for the mortgagees to conduct the sale (d).

or insolvent;

The assignees of an insolvent, under the 1 & 2 Vict. c. 110, (see s. 47), were bound, if practicable, to sell his real estate by public auction, in such manner, and at such place or places,

(v) *Bulkeel v. Lord Abinger*, 6 Jur. 410, V.-C. W.

(x) 23 & 24 Vict. c. 145, ss. 1, 32, 34.

(y) See 3 Dav. Conv. 464 n. and as to the scope of sect. 1, *ib.* 460 n.

(z) *Hamer v. Sharp*, L. R. 19 Eq. 108, V. C. H.

(a) *Ex parte Dunman*, 2 Ro. 66.

(b) See Sup. 60 *et seq.*

(c) *Ex parte Lewis*, 1 Gl. & J. 69.

(d) *Ex parte Girdlestone*, 3 M. D. & De G. 302, V.-C. E. B.; *Ex parte M'Gregor*, 4 De G. & S. 608. As to directing a

sale on the petition of a mortgagor, before the time fixed by the mortgage deed, see *Ex parte Bignold*, 3 Mon. & A. 477, which Lord St. Leonards queries. The general order did not seem to apply if the mortgagee could not prove for the deficiency, *Ex parte Knightley*, 3 De G. & S. 583; nor to equitable mortgages, as distinguished from mortgages of equitable interests, *Ex parte Payler*, 18 Vm. 424.

as should be directed by the creditors; if, however, they ineffectually attempted to sell by auction, they could, after the expiration of the time (six lunar months) limited by the Act, sell by private contract, with the consent of the major part in value of the creditors present at a meeting duly convened for the purpose (e): nor was a sale necessarily invalid by reason of the directions of the creditors as to the manner of sale not having been strictly complied with, the provisions in the Act being merely directory (f). As respects leaseholds for years, the assignees were merely required to sell with all convenient speed, and had an entire control over the mode of sale (g).

Under the Bankruptcy Act, 1869, the trustee has power to sell all the property of the bankrupt, by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels (h).

or trustee of bankrupt under the recent Act;

Mortgagees, trustees and agents for sale, may, in the absence of restriction, sell by private contract or public auction (i): and though not bound to offer the estate to public competition, before disposing of it privately (j), they should, as a general rule, unless specially authorized to sell by private contract, sell by auction, to avoid questions with their beneficiaries, as to whether the price obtained was adequate (k).

or mortgagees, trustees, or agents.

They may also, as a general rule, sell either altogether or in parcels (l); subject of course, to a liability to be called to account in Equity if they adopt a mode of sale which is

Estate may be sold in parcels.

(e) *Mather v. Priestman*, 9 Sim. 352; see *Doc v. Evans*, 1 C. & M. 450.

(f) *Wright v. Maunders*, 4 Deav. 512.

(g) *Supra*, p. 54.

(h) 82 & 83 Viot., c. 71, s. 25.

(i) Sug. 61.

(j) *Davey v. Durrant*, 1 De G. & J. 535, 538, case of mortgagee selling under power; *Harper v. Hayes*, 2 De

G. F. & J. 542, case of trustee.

(k) See now as to trusts created since 28 Aug., 1860, 23 & 24 Vict. c. 145.

(l) Sug. 61. It appears that a trust for sale of "any part of" an estate, at the discretion of the trustees, would authorize a sale of the entirety; *Lord Rendlesham v. Meux*, 14 Sim. 249; see *Cooke v. Farrand*, 7 Taunt. 122.

Chap. II.
 Sect. 3.

But not in
 undivided
 shares :
semble.

Standing
 timber, &c.,
 must be sold
 with the fee;

so also
 minerals ;

except under
 the Confirmation
 of Sales
 Act ;

clearly depreciatory : but it may be doubted whether, even at Law, a power (m) of sale, unless it contained expressions pointing to such a mode of dealing with the estate, would be well exercised by a sale of an undivided share. They may not concur with the owners of other properties in a joint sale, except where obviously beneficial to their *cestuis que trust* (n) ; and it has been decided that trustees for sale under a settlement must sell the standing timber with the estate, although the tenant for life be unimpeachable of waste (o) ; and that a sale of the estate, apart from the timber, is void at Law (p) : so where the trust is to sell for payment of debts or other limited purposes, and subject thereto the estate is settled on A. for life, with remainders over, the trustees may not fell and dispose of the timber, instead of selling the fee simple of part of the estate (q) ; the same doctrine applies to a reservation of minerals, or any other part of the inheritance, upon a sale by fiduciary vendors (r) ; although special circumstances, such as local custom, or the peculiar nature of the property, may occasionally render such a mode of sale desirable and proper. Where a will empowered trustees with the consent of the tenant for life, who was unimpeachable for waste, to sell all or any part of the settled lands, it was held that they could not sell the surface, reserving the minerals (s). This decision led to the passing of the 25 & 26 Vict. c. 108, which after giving retrospective validity to sales, &c., from which the minerals were excepted, enables trustees or donees of a power of sale, to dispose of land with a reservation of

(m) *Chance on Powers*, 241.

(n) *Ride v. Oakes*, 10 Jur. N. S. 1246, overruling *Lord Romilly*, 32 Beav. 555 ; compare *McCarogher v. Whieldon*, 34 Beav. 107.

(o) *Cockerell v. Cholmeley*, 1 Russ. & M. 418 ; see *Waddington v. Widdron*, 23 L. J. N. S. 713 ; *Buckley v. Howell*, 29 Beav. 546.

(p) *Cholmeley v. Paxton*, 3 Bing. 207.

(q) *Davies v. Wencomb*, 2 Sim. 425 ; *Marker v. Kekewich*, 8 Ha. 299 ; but see *Kekewich v. Marker*, 3 Mac. & G.

311. See a case of *Silvester v. Bradley*, 13 Sim. 75, where it was unsuccessfully contended that the inheritance of the timber was, in Equity, severed from the inheritance of the soil ; and *Butler v. Borton*, 5 Madd. 40. See too *Bennett v. Wyndham*, 23 Beav. 521.

(r) But not (it is conceived) to a reservation of mines, on sales to Railway or Waterworks Companies ; see 8 Vict. c. 20, s. 77, and 10 Vict. c. 17, s. 18.

(s) *Buckley v. Howell*, 29 Beav. 546 ; and *vide infra*, Ch. XX.

minerals, and either with or without powers of working the same, but the sanction of the Court of Chancery must be previously obtained (*t*). A special authority to sell minerals and easements apart from the surface, or *vice versa*, is now commonly inserted in well-drawn instruments, in appropriate cases.

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Sect. 2.

So under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), the Court of Chancery may authorize a sale of mines apart from the surface (*u*).

or the Settled
Estates Act.

Where the trust is to sell for purposes which may, but will not necessarily, require a sale of the entirety, a purchaser need not see that no more is sold than is requisite (*x*).

Exclusive sales
for limited
purposes.

Fiduciary vendors are also bound to use all reasonable diligence to obtain a fair price (*y*): if, therefore, they sell by auction they should give due notice of and advertise the sale: and if the estate have been advertised to be sold in one particular manner (as in lots), they should not sell in any other way (as altogether, or under a different plan of allotment,) without re-advertising the sale in accordance with the proposed alterations (*z*). But when a binding contract has been entered into to sell at a fair price, they cannot break it off in order to accept a higher offer (*a*).

Advertise-
ments.

A trust to sell land as building land, has been held to authorize the trustees to set it out and make the necessary roads, and pay the expenses out of the proceeds of sale (*b*). Where land is sold for building purposes, under the ordinary

As to sales for
building
purposes.

(*t*) As to what are minerals within the Act, see *in re Brown's estate*, 11 W. R. 19, and generally as to what are minerals, *Derrill v. Roper*, 3 Drew. 294; *Earl of Rosse v. Wainman*, 14 M. & W. 684; *Hext v. Gill*, L. R., 7 Ch. Ap. 699, and definition of Melish, L. J., at p. 712.

(*u*) *Re Mallin*, 3 Giff. 126; *Re Lav*, 7 Jur. N. S. 511. See 19 & 20 Vict. c. 120, sec. 11.

(*x*) *Spalding v. Shalmer*, 1 Vern.

301; *Dolton v. Hewen*, 6 Madd. 9; Sug. 658; *Thomas v. Townsend*, 16 Jur. 736.

(*y*) 3 Mer. 208.

(*z*) *Ord v. Noel*, 5 Madd. 438; see p. 441.

(*a*) *Goodwin v. Fielding*, 4 De G. M. & G. 90; See *Harper v. Hayes*, 2 De G. F. & J. 542.

(*b*) *Cookson v. Lee*, 23 L. J. Ch. 473.

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power of sale and exchange, a difficulty often occurs in practice as to the laying out of the roads and as to the feasibility of securing to purchasers a right of way over such roads. The best plan seems to be to let each lot comprise a moiety of the adjacent road, *usque ad medium viæ*; and to reserve rights of way over it in favour of the purchasers of neighbouring lots; and it is conceived that such a reservation, over land actually sold under the power, would be supported: but this does not get rid of the difficulty in respect to so much of the roads as have to be formed over plots which remain undisposed of; the common power not apparently authorizing the sale of mere easements over lands which may possibly be retained in settlement (c). It is very desirable in settlements and wills affecting land which is likely to be used for building, to insert special clauses providing for these and other difficulties, which in modern practice often interfere with the advantageous letting or sale of property as a building estate.

Under Settled Estates Act.

Under the Leases and Sales of Settled Estates Act (d), the Court has power to direct that any part of the settled estates shall be laid out for streets, squares, gardens, sewers, &c.; either to be dedicated to the public or not; but it will not interfere unless these works are required for the immediate improvement of the property in its existing state, or with a view to its being at once leased or sold for building (e); nor will the Court sanction a sale of part of the estate, in order that the proceeds may be expended on roads or the like, for facilitating the granting of building leases (f).

As to the effects of reserving the roads upon a sale of land in a mineral district.

It sometimes happens that upon the sale in lots of a large estate, roads, which have been made by the vendor for the purposes of access to the several portions of the property, are reserved to him. In a case which recently came under the author's notice, the effect, although unintended, of such

(c) See, as to the case of a lease under a power, *Dayrell v. Moore*, 12 Ad. & Ell. 364.

(d) 19 & 20 Vict. c. 126, sec. 14, 15; and vide *infra*, Ch. XX.

(e) *Re Hurst's Settled Estates*, 2 H. & M. 198.

(f) *Re (The Duke of Devonshire's) Settled Estates*, 24 Beav. 688.

a reservation was to secure to the vendor an undue advantage by interposing a barrier which enabled him to preclude the purchasers from working by outstroke valuable minerals which were found to exist under the property.

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Sect. 2.

A trustee for sale in a mortgage deed should not sell without notifying his intention to the mortgagor (*g*): nor can a mortgagee sell pending a suit to redeem (*h*); and he sells at his own risk if a tender has been made him of his principal, interest, and costs (*i*). Where an equity of redemption was conveyed to a second mortgagee upon trust to sell, and out of the proceeds to pay off the first mortgage, then the second mortgage, and to pay the surplus to the mortgagor, it was held that the trust was duly carried out by a sale subject to the first mortgage (*k*).

Sale under
mortgage.

But a sale by a mortgagee, although harsh and improvident, will not be set aside in Equity, if clearly within the terms of the power; nor will a mere offer, unaccompanied by actual tender, of the amount due to him, be sufficient to prevent a sale (*l*). And so long as anything remains due on the security, a mortgagee may pursue all his remedies concurrently (*m*); but where on a sale he allows his agent to receive the sale moneys, he cannot, if they are misapplied or lost, sue the mortgagor for the mortgage debt (*n*). If acting *bond fide*, a mortgagee can only be stopped by tender of principal, interest, and costs (*o*): and it would require a strong case to induce the Court to restrain an intended sale by a mortgagee under special conditions, on the ground of their undue stringency (*p*),

Oppressive
sale by mort-
gagee not
necessarily
invalid.

(*g*) *Anon.* 6 Madd. 10.

(*h*) *Rhodes v. Buckland*, 16 Beav. 312.

(*i*) *Jenkins v. Jones*, 6 Jur. N. S. 391.

(*k*) *Manser v. Dias*, 3 Jur. N. S. 252.

(*l*) See *Matthie v. Edwards*, on appeal, 11 Jur. 761; and (as *Jones v. Matthie*) 11 Jur. 504, reported below, 2 Coll. 465; and see *Grugson v. Gerard*, 4 Y. & C. 119. Money paid

for expenses by mortgagor to mortgagee's solicitor, under a threat of an exercise of a power of sale, but not really due, may, it seems, be recovered at Law; *Close v. Phipps*, 7 Man. & G. 586.

(*m*) *Lockhart v. Hardy*, 9 Beav. 354; *Cockell v. Bacon*, 16 Beav. 158.

(*n*) *Palmer v. Hendrie*, 28 Beav. 341.

(*o*) *Paynter v. Curwen*, 18 Jur. 41.

(*p*) *Kershaw v. Kalow*, 19 Jur. 574.

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Notice of sale.

but of course if the sale be clearly oppressive, as *e. g.* where the mortgagee overstates the amount of his debt, and thus deters the person entitled to redeem from paying it off, the Court will interfere (*g*). Where, as is usually the case, the power is exercisable only upon notice, a contract for sale is not invalid by reason of its being entered into before the expiration of notice duly given (*r*): nor need notice be given if not required by the terms of the power (*s*). In one case which cannot be regarded as satisfactory, a purchaser was compelled to take a conveyance without the mortgagor's concurrence; although it was apparent from the dates of the instruments, that the required notice had not been given (*t*): but it was more recently held, that the clause protecting a purchaser from inquiring whether due notice has been given is unavailing if he buys with the knowledge that notice has not been given (*u*).

When to be
given to the
assigns of
the mortgagor.

Where the equity of redemption has been incumbered, and the power does not contain the usual clause making an irregular sale valid as in favour of a purchaser, a sale without the required notice—if required by the terms of the power to be given to the assigns of the mortgagor (*x*)—is invalid as against the subsequent incumbrancers, even although the mortgagor expressly waive the notice and consent to the sale (*y*). A notice fairly given pursuant to the terms of the power is valid, although the party on whom it is served is an infant (*z*); so, too, it would seem, if he is a lunatic (*a*), or totally blind, or deaf (*b*); and the Court is slow to interfere as against a *bond fide* purchaser: thus, where notice was given by the mortgagee of an intention to sell, if payment

(*g*) *Jenkins v. Jones*, 6 Jur. N. S. 191.

(*r*) *Major v. Ward*, 4 Ha. 598; which also see, as to mode of giving notice.

(*s*) *Dacey v. Durrant*, 1 Da. G. & J. 135.

(*t*) *Ford v. Holey*, 3 Jur. N. S. 111, V. C. S.

(*u*) *Parkinson v. Hanbury*, 1 Drew. & Linn. 143.

(*x*) It is very desirable to omit the word "assigns" from the clause requiring notice.

(*y*) *Forster v. Hoggart*, 15 Q. B. 155.

(*z*) *Tracey v. Lawrence*, 2 Dr. 403.

(*a*) *Robertson v. Lockie*, 15 'Sin. 235; *Mellersh v. Keen*, 27 Beav. 236, cases of notice of a dissolution of partnership.

(*b*) *Robertson v. Lockie*, *supra*.

was not made at the end of six months from the date, but was not actually served till nearly three weeks afterwards, it was held that the notice was not invalid; the sale not having been made until more than six months had elapsed since the delivery of the notice (c). Subsequent negotiations between the mortgagee and mortgagor may amount to waiver of a notice duly given (d).

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Sept. 2.

In the case of a mortgage of hereditaments, executed after the 28th August, 1860, six months' notice in writing must, unless the deed otherwise directs, be given to the person or one of the persons entitled to the property subject to the charge, or be affixed on some conspicuous part of the property, before the statutory power of sale can be exercised; but the purchaser's title is not to be impeached on the ground that no case had arisen to authorize the exercise of the power, or that no such notice had been given (e).

Notice to be
given under
Lord Cran-
worth's Act.

Fiduciary vendors are not, without special authority, justified in selling under any unnecessary and depreciatory special conditions (such as a condition that the purchaser shall take, at a valuation, fixtures belonging to a third person); or that he shall take the property saddled with a disadvantageous contract, into which they have improvidently entered (f); or conditions unnecessarily restrictive of the purchaser's right to a marketable title: it is by no means clear that, under such circumstances, they can make a title which a purchaser can be advised to accept (g). They should, however, take care that their title to the property as described in the particulars is good, or that the defect is guarded against by apt conditions; and where from neglect in this respect a mortgagee failed in a suit against a purchaser for specific performance, he was disallowed the costs of the suit as against the mort-

Sale under
depreciatory
conditions
improper.

(c) *Metters v. Brown*, 9 Jur. N. S. 958.

(d) *Tomney v. White*, 3 H. L. C. 49;

Davey v. Durrant, 1 De G. & J. 535;

Metters v. Brown, 9 Jur. N. S. 258.

(e) 23 & 24 Vict. c. 145, s. 13.

(f) *Marriott v. Anchor Reversionary Co.*, 3 De G. F. & J. 177.

(g) 1 Mer. 268; Dav. Conv., vol. i, p. 440.

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Depreciatory.

What are not
depreciatory.

gagor (*h*). But, even without express authority, a fiduciary vendor may, it is conceived, insert a condition enabling him to rescind the contract, in the event of the purchaser insisting on an objection, which he is unable or unwilling to remove; for though such a condition may, in a certain sense, be depreciatory, yet it is one which a prudent owner, selling in his own right, would introduce (*i*). So, too, a condition that part of the purchase-money, such part not exceeding the amount of the mortgage-debt, may remain on the security of the property, is free from objection (*k*).

Trustee
vendor under
V. & P. Act
1874.

By the Vendor and Purchaser Act, 1874 (*l*), trustees who are either vendors or purchasers may sell or buy without excluding the application of the rules which by the Act, in the absence of any stipulation to the contrary, now govern the obligations and rights of vendor and purchaser. These rules will be noticed more fully hereafter (*m*).

Mortgagee's
power to sell
under Lord
Cranworth's
Act.

A mortgagee of hereditaments, whose security is subsequent to the 28th August, 1860, may, unless restricted by the terms of the instrument, sell, subject to any *reasonable* conditions which he may think fit to make, and may rescind or vary contracts for sale, and buy in and re-sell the property (*n*); and a trustee who, under a trust created since that date, has power to sell any hereditaments, may sell subject to such special or other stipulations as he shall think fit (*o*); but, of course, this will not justify him if he insert conditions which are not warranted by the state of the title, or the circumstances of the property.

Sale by
mortgagee at
request, for
purpose of
clearing a
title.

Where an estate in mortgage is contracted to be sold by parties claiming the equity of redemption, and difficulties arise upon the title subsequent to the mortgage, it often happens that the mortgagee, if he has a power of sale, is

(*h*) *Pear v. Odey*, 15 Beav. 209.

(*i*) *Fellows v. Equitable Reversionary Co.*, 4 Deen. 352, and the V.-C.'s judgment.

(*k*) *Dovey v. Durrant* 1 De G. & J.,

535, *vide* *infra*, p. 79.

(*l*) 37 & 38 Vict. c. 78, ss. 2 and 3.

(*m*) Ch. IV.

(*n*) 25 & 26 Vict. c. 145, s. 11.

(*o*) 25 & 26 Vict. c. 145, s. 2.

requested to exercise it, for the purpose of getting rid of the difficulty; and doubts are often expressed as to the validity of the scheme; or, at any rate, whether the mortgagee can safely comply with the request. Assuming, as, of course, must be assumed, that the power is exercisable according to its terms, and the mortgagee chooses to receive his money, and to obtain it by means of the power, it is conceived that no valid objection can be made to such an arrangement. A man taking merely that which belongs to him, by means of the security which he has contracted for, does not act improperly in so doing, merely because one principal reason for his calling in the money is a wish to benefit another person. The case, however, might be different if it were part of the arrangement that the mortgage debt should be again lent to the purchaser.

If trustees employ an agent to sell, or confide the sale to a co-trustee, &c., they will be responsible for his acts (*p*).

Trustees, &c.,
employing
agent, are
responsible
for his acts.
Sale with
consent, what
consent
sufficient.

It seems to be doubtful whether, when a power of sale is exercisable only with a specified consent, a general prospective consent is sufficient (*q*); or whether there must not be a consent to the particular sale: but it would seem that consent given after the execution of the power is sufficient (*r*). Where consent in writing is required by the terms of the power, a parol consent, even though followed by an act of part performance by the consenting party, will not be sufficient (*s*). In a recent case, where property was devised upon trusts for sale, but not without the consent of certain specified persons, who were legatees of the proceeds, and the trustees, after the death of one of the legatees, but with the concurrence of the person beneficially entitled to his share

(*p*) 1 Atk. 87; *Oliver v. Court*, 8 Pri. 127, 167; *Bryce v. Stokes*, 11 Ves. 319; 2 Wh. & Tud. L. C. 638; and see *Stylos v. Gwy*; 1 Mac. & G. 422.

(*q*) See *Hawkins v. Kemp*, 3 East, 410, 427.

(*r*) *Offen v. Harman*, 1 De G. F. &

J. 253, but there had been a prior parol consent, and see *Chance. Pow.* 727 to 737; and *Att.-Gen. v. Sitwell*, 1 Y. & C. 559; *Wiles v. Gresham*, 2 Dre. 258.

(*s*) *Phillips v. Edwards*, 33 Beav. 440.

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and with the consent of the remaining legatees, contracted to sell the property, the title was considered too doubtful to be forced on a purchaser (*t*). We have seen that a consent is not necessarily invalid by reason of its effect being to benefit the consenting party (*u*). In the case of a lunatic, the committee may consent by order of the Chancellor (*x*); and where a tenant for life, whose consent is necessary to a sale, becomes bankrupt, a good title may be made with the assent of the bankrupt and his assignees or trustee (*y*).

Whether
consenting
power of
tenant for life
is affected by
alienation, &c.

A question has frequently arisen, as to whether the power of a tenant for life to consent to a sale is affected by the alienation of, or incumbrances upon, his life estate. The general rule of law is, that no one shall derogate from his own grant. If, therefore, the deed of assurance contain an actual or implied engagement that the alienee or incumbrancer shall enjoy the property *in specie*, the consenting power of the tenant for life cannot be exercised, as against such alienee or incumbrancer, without his concurrence: but if the deed contain an actual or implied recognition of the liability of the property to conversion during the existence of the life estate, then the consenting power of the tenant for life seems to be unaffected in cases of mere equitable powers (*z*). At Law the decisions recognise the continuance of the power in cases where the alienation is partial, or merely by way of mortgage, or for some other limited purpose (*a*); but in these cases, the power cannot be exercised so

(*t*) *Sykes v. Sheard*, 2 De G. J. & S. 6; 33 Beav. 114. This decision is understood to have been a surprise on the counsel who successfully supported the objection. The decision of the Court of Appeal was mainly rested on the difference of opinion entertained by judges, which is no longer a ground for rejecting the title; see *Beidley v. Carter*, L. R. 4 Ch. Ap. 230.

(*u*) *Clarke v. Seymour*, 7 Sim. 67; *supra*, p. 62.

(*x*) 16 & 17 Vict. c. 70, ss. 136, 137.

(*y*) *Holdsworth v. Goose*, 29 Beav.

111; *Eisdale v. Hammealy*, 31 Beav. 255.

(*z*) See 5 Jarm. Conv. by Sweet, 161, *et seq.*; *Warburton v. Farn*, 16 Sim. 625; *Morgan v. Rutsen*, *ib.* 234; and *Lord Leigh v. Lord Ashburton*, 11 Beav. 470 (where the life estate was subject to judgments), and *cases cited*. *Hurst v. Hurst*, 16 Beav. 372. See special provisions in the Succession Duty Act, 1853, s. 42, as to charges created by the Act not affecting powers of sale, exchange or partition.

(*a*) See Sug. Pow. 8th ed., ch. vii.

as to defeat interests previously created by the donee of the power (b). It has been thought (c) that an alienation out and out necessarily destroys the power; but this opinion has not met with general approval (d); and it seems to be now well settled that the power is not extinguished by an absolute alienation of the life estate, though of course it cannot be exercised to the prejudice of the alienee. Thus in a recent case (e) where A., being entitled for life, with an ultimate remainder in default of children to himself in fee, first sold all his interest in the settled estate to B., and afterwards the trustees of the settlement by his direction sold the same estate to B. in exercise of their power, the second sale was upheld as a valid exercise of the power.

The consenting power of the tenant for life is not affected by his concurring as Protector in a disentailing assurance by the tenant in tail in remainder; although the deed is expressed to be made "to the intent that all estates, powers, rights, and interests limited to take effect after the determination, or in defeazance of the estate tail should be put an end to, and to limit the estate in fee simple" (f).

Not affected
by his concurrence as
Protector.

We may here remark that, as a general rule, a power of or trust for sale, out and out, for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage; but that where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage; which will then be supported as a conditional sale (g). On the other hand, a restriction against raising a sum of money by sale of an estate has been held also to preclude a mortgage (h); so,

Power of
sale, when it
authorizes a
mortgage.

a. 5, and see, too, *Tyrell v. Marsh*, 3 Bing 31; *Warburton v. Farn*, 6 Sim. 625; *Hill v. Pritchard*, Kay, 394; *Simpson v. Bathurst*, L. R., 5 Ch. Ap. 193.

(b) *Goodright v. Cater*, Dougl. 460.

(c) See Sug. Pow. 8th ed., ch. vii. s. 5.

(d) See Chance. Pow. 3157 et seq.

(e) *Alexander v. Mills*, L. R., 6 Ch. Ap. 124.

(f) *Hill v. Pritchard*, Kay, 394.

(g) See *Stroughill v. Anstey*, 1 De G. M. & G. 645; *Page v. Cooper*, 16 Beav. 396.

(h) *Benett v. Wyndham*, 23 Beav. 521, *see qu.*

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too, a lease is, *prima facie*, not within the scope of a trust for sale (i).

Whether a trustee with power to mortgage can give a power of sale.

It has been held that a trustee, who has merely a power to mortgage, cannot give a mortgage of real estate with a power of sale, though he may do so as to chattels (k); and it seems only reasonable that a person having in himself no power to sell should be unable to delegate such a power to another. But it has been held that an executor, in mortgaging his testator's leaseholds, may give a power of sale (l). So, too, in a later case, a power given to an executor to mortgage real estate was held to authorize the insertion of a power of sale (m); and the tendency of the recent decisions has been to treat a power of sale as a necessary and proper incident of every mortgage; and since the 23 & 24 Vict. c. 125, a power of sale in the statutory form has, unless expressly excluded, become an implied part of every mortgage executed after the passing of the Act. A power to raise money by sale or mortgage authorizes a mortgage with a power of sale (n).

Whether power of sale authorizes partition or enfranchisement.

It is doubtful whether a power of sale and exchange authorizes a partition; but there can be little or no doubt that it authorizes an enfranchisement; which is in fact merely a sale of the freehold to the tenant instead of to a stranger.

Section 3.

The price.
As to the consideration: they must sell for gross sum.

(3). The Price.

They must sell for a gross sum of money, unless any other consideration be specially authorized: for instance, a sale in consideration of a rent charge (o) or annuity is

(i) *Evans v. Jackson*, 8 Sim. 217.

(k) *Clarke v. Royal Panopticon Co.*, 4 Drew. 26.

(l) *Russell v. Plaice*, 18 Beav. 21. *Earl Vane v. Ripden*, L. R. 5 Ch. Ap. 663; *re Osbourne's Will*, L. R. 8 Eq. 569; and *Croft v. Duffin*, L. R. 18 Eq. 555, where the mortgage was to a benefit building society.

(m) *Cook v. Deane*, 29 Beav. 125.

but see on appeal, 2 De G. F. & J. 127. See, too, *Leigh v. Lifford*, 2 De G. J. & S. 830; *Selby v. Cooling*, 23 Beav. 418; where the mortgage was ordered by the Court.

(n) *Bridges v. Longman*, 24 Beav. 27; *re Osbourne's Will*, L. R. 8 Eq. 570.

(o) *Read v. Shaw*, Sug. Pow., 8th ed. 864.

invalid (p); but a mortgagee, selling under a general power of sale, may allow a part of the purchase-money, of course not exceeding the amount due on the security, to remain on mortgage of the estate, provided that he debits himself in account with the mortgagor with the whole price, and the sale and mortgage are distinct transactions (q). Statutory owners under the Lands Clauses Consolidation Act were expressly restricted to a sale for a gross sum, except where the vendor was seised in fee (r); but under the Amendment Act, the land may in any case be sold upon a chief rent (s).

They should use all reasonable diligence (t), as if the estate were their own, to obtain a fair price; and, therefore, should ascertain its value, even at the expense of a valuation (u), where circumstances seem to render such a course expedient; but they are not, it is conceived, justified in agreeing to sell, at a price to be fixed by valuation, or in any other manner. The price, whatever means they may take of ascertaining what it ought to be, must eventually be determined by a free exercise of their own judgment. Of course they are not justified in entering into an agreement with an intending purchaser, giving him a future option to purchase at a fixed price (x). Although bound to sell by auction, they may, it seems, without special authority, fix a reserved bidding; and, after an ineffectual attempt to sell, buy in at that price (y): but if they do so, and there is a delay in the re-sale, they may be held answerable for the loss sustained (z). In one case, instead of putting up the property again for sale, liberty was given

And may have
estate valued.

(p) *Reid v. Shergold*, 10 Ves. 370, 381.

(q) *Davey v. Durrant*, 1 De G. & J. 535: and see *Thurlow v. Mackeson*, L. R. 4 Q. B. 97.

(r) Sects. 10 & 11.

(s) 23 & 24 Vict. c. 106, s. 2.

(t) *Ord v. Noel*, 5 Madd. 438, 440; and see 10 Ves. 309; Sug. 61. *Harper v. Hayes*, 2 De G. F. & J. 542; 2 Giff. 210.

(u) See 5 Ves 680.

(x) *Clay v. Rufford*, 5 De G. & S. 768.

(y) *Re Peyton's Settlement*, 8 Jur. N. S. 453; 30 Beav. 252; *Else v. Barnard*, 28 Beav. 228; *Bousfield v. Hodges*, 33 Beav. 90.

(z) *Taylor v. Tabrum*, 6 Sim. 281; *Fry v. Fry*, 27 Beav. 144, where there was no previous attempted sale by auction.

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to the trustee to purchase at the reserved price, when that appeared to be the full value (a). A condition, reserving a bidding, although it may, under the circumstances of the case, subject the trustees to liability to their *cestuis que trust*, will bind bidders at the sale (b).

Contract by
cestuis que
trust:
adoption of by
trustee.

In cases where estates are vested in trustees in trust to sell at the request of their *cestuis que trust*, the usual course is, for such *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motive for obtaining the highest possible price, to enter into a conditional contract of sale, and then to obtain the assent of the trustees; who, when they have satisfied themselves that the sum proposed to be given for it is the value of the property, ought to sanction a sale which is beneficial for the persons for whom they are trustees. And a trustee capriciously refusing to adopt a contract so entered into, has been fixed with the costs of a suit for removing him from the trusts (c).

Trustee ought
to promote
competition
between rival
bidders.

If a trustee offers property for sale by private contract, and there are rival bidders for it, he ought to promote competition between them; but he is under no obligation to recede from his acceptance of an offer, in order to entertain a higher bid. Where a trustee for sale of an estate, not readily saleable by action, with the consent of all his *cestuis que trust* offered it to a purchaser at a specified price, and before the offer was unconditionally accepted, received a bid of a similar amount from another person, a sale to the person to whom he had first offered the estate was upheld (d).

Assignee of
insolvent
selling below
reserved price,
could make
title.

It has been held that the assignee of an insolvent under the 1 & 2 Vict. c. 110, selling by auction at a price below the sum fixed by the creditors for a reserved bidding, could

(a) *Farmer v. Dean*, 32 Beav. 327. * 568.

(b) *Lory v. Pendergrass*, 2 Beav. 415.

(c) *Palmer v. Carey*, 32 Beav. 210.

(d) *Harper v. Hayes*, 2 De G. F. & J. 542; overruling *V.-C. S. 2 Giff.*

210. Consider this case.

make a good title; but was personally answerable to the creditors if he had improperly exercised his discretionary power (e).

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It appears (f) that the biddings for an estate sold in Bankruptcy may be opened before conveyance, upon terms similar to those on which biddings were, till recently (g), opened in Chancery (h); though the practice is disapproved of (i).

Opening
biddings in
bankruptcy.

As a general rule, fiduciary vendors, selling by auction, and using all proper precautions to effect an advantageous sale, incur no responsibility should the estate sell below its value; and Equity will even help the purchaser to his bargain (k).

Fiduciary
vendors not
responsible
for loss on
sale by
auction.

Under the Lands C. C. Act, 1845, statutory owners have no power to fix the price; this must be determined either by a jury, or arbitration, or valuation (l): it is conceived however that a company agreeing with a statutory owner to purchase at a certain price, is bound, if such price be subsequently ascertained, in manner prescribed by the Act, to be a fair value of the land (m). Where a satisfactory title cannot be made, the Company should go to a jury; and they then get a price fixed which binds the true owner, whoever he may be (n).

Statutory
owners cannot
fix price.

Where real property is settled in the usual way, with a tenancy for life, and a discretionary power of sale in trustees and a trust for re-investment of the purchase-money in land,

Costs of
re-investment
on sale by
trustees to
railway
companies,
&c.

(e) *Wright v. Maunder*, 6 Jur. 71; 4 Beav. 512; and see *Sidobotham v. Barrington*, 4 Beav. 110.

Ormsby, 2 Mol. 446.

(f) *Ex parte Hutchinson*, 2 Mon. & A. 727; *Ex parte Partington*, 1 Ba. & B. 209; *Ex parte Lee*, 12 Jur. 995; 1 De G. 628.

(k) 5 Madd. 440.

(l) Sect. 9; *vide infra*, Ch. XIII.

(m) See *Hawkes v. Eastern Counties R. Co.*, 1 De G. M. & G. 737; affirmed 5 H. L. Cas. 331; *Potts v. Thames Haven Co.* 15 Jur. 1004.

(g) 30 & 31 Vict. c. 48, ss. 7, 9.

(n) *Douglas v. L. N. W. R. Co.* 3 K. & J. 173.

(h) *Infra*, Ch. XXI.

(i) Sug. 65. *In re Martin &*

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it may be a question whether the trustees could safely exercise the power, for the purpose of a sale under the Lands C. C. Act, except under a special stipulation that the Company shall bear the costs of re-investing the purchase-money, in the same way as if the sale had been made by the tenant for life, under the statutory power (o); or with such an increase of purchase-money as may be considered an equivalent to the probable amount of such costs.

Sale by
equitable
tenant for life
under Lands
C. C. Act.

An equitable tenant for life, though he can bind those in remainder, cannot by the 7th sect. of the Lands C. C. Act 1845, make a valid conveyance at law, without the concurrence of the trustees having the legal estate (p).

By municipal
corporations.

Municipal Corporations, if not within the Municipal Corporations Act, have *prima facie* the same powers of alienation as a private individual, though this presumption may be rebutted by showing that they hold their lands upon trusts (q); but under the Lands C. C. Act 1845 no Municipal Corporation can sell land required by the promoters for extraordinary purposes, except with the consent of the Treasury (r); the signature of the Secretary of the Commissioners to a letter of consent is sufficient (s); but no consent can be given in respect of land not specified in the memorial (t).

Committees
of lunatics.

Committees of lunatics ought not to exercise statutory powers of sale without the consent of the Chancellor (u).

Assignee
buying in,
liability of.

Under the late Bankruptcy Law, if the assignee of a bankrupt, being unauthorized by the creditors, bought in

(o) See sect. 80.

(p) *Lippincott v. Smyth*, 29 L. J. Ch. 520.

(q) *Esan v. Corporation of Avon*, 29 Beav. 144; and see 5 & 6 Will. IV. c. 76, s. 94; and Grant on Corporations, p. 365; and as to mortgages and also sales and purchases by municipal corporations, see 23 Vict. c. 10.

(r) Sect. 15 of Act.

(s) *Arnold v. Mayer, &c. of Gravesend*, 25 L. J. Ch. 776, V.-C. W.

(t) *Id.*

(u) *In re Wade*, 1 H. & Tw. 202; *In re Taylor*, 1 H. & Tw. 432; and see 16 & 17 Vict. c. 76, ss. 124, 125, 136, 137.

the estate, he was, unless they subsequently sanctioned the step, deemed a purchaser on his own account (x); and in one case where the assignees put up the estate in two lots, and bought in both without authority, and, on a re-sale, there was a loss upon lot A., but a gain upon lot B., they were charged with the loss, and were not allowed to set off the gain (y). The mere putting up a lease to sale by assignees, who had not taken possession, without describing it as having belonged to the bankrupt, or as belonging to themselves, did not fix them as assignees of the lease, if not knocked down (z); *sed contra* if a sale was effected, and a deposit paid, although the contract subsequently went off, unless, perhaps, it was clearly shown that it could not have been enforced (a): but, of course, an actual assignment, if made within a reasonable time after the date of the bankruptcy, was an acceptance; and what was a reasonable time was a question for a jury (b): the assignees could not decline the property after having duly elected to take it (c).

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Could not set off excess on re-sale of one lot, against deficiency on re-sale of another.

What a sufficient election by assignee to take a lease;

By section 145, of the Bankruptcy Act, of 1849, a lessor was enabled in a summary way to compel the assignees either to elect to take the lease or to give up possession. This section was not repealed by the Act of 1861, which provided that in every case of a lease, or an agreement for a lease, the assignees might elect to take the same, and to keep possession up to some quarter or half-yearly day, on which rent was made payable by the same lease or agreement, such day not being more than six months from the adjudication of bankruptcy, or upon such day to decline to take the same (d).

under the
Acts of 1849
and 1861.

(x) *Ex parte Lewis, ex parte Buxton*, 1 Gl. & J. 69, & 355; see *ex parte Cuddon*, 7 Jur. 334; *S. C.* 3 M. D. & De G. 302; and see *Ex parte Tomkins*, Sug. Appendix, No. IX.; *Ex parte Skinner*, 1 Mon. & A. 81.

(y) *Ex parte Lewis*, 1 Gl. & J. 69.

(z) *Turner v. Richardson*, 7 East, 325.

(a) *Hastings v. Wilson*, Holt's N. P. C. 290.

(b) *Mackley v. Pattenden*, 7 Jur. N. S. 1056.

(c) *Lawrence v. Knowles*, 7 Sc. 381.

(d) 24 & 25 Vict. c. 134, ss. 131, 150, and as to similar provisions in earlier statutes, see 6 Geo. IV. c. 16, s. 75; 12 & 13 Vict. c. 106, s. 145; 1 & 2 Vict. c. 110, s. 50; 7 & 8 Vict. c. 96, s. 12. See now the Bankruptcy Act, 1869.

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Disclaimer by
the trustee
under the Act
of 1869.

Under the Act of 1869, the trustee, notwithstanding that he has endeavoured to sell, or has taken possession, or exercised acts of ownership, may, by writing under his hand, disclaim any property of the bankrupt, of whatever tenure, which is burdened with onerous covenants (e); but he must make his option within a period of not less than twenty-eight days after a receipt of a written application from any person interested in the property, requiring him to decide whether he will disclaim or not (f). Where, however, the property consists of a leasehold interest, the trustee may not disclaim without leave of the Court (g), which may be given or withheld at discretion (h); and if for the purpose of obtaining such leave an extension of time is required, application for it must be made before the twenty-eight days have expired (i).

Sale by a
mortgagee
who makes a
gift of the
price.

Where a mortgagee in possession agreed to sell a portion of the land as a site for a hospital, and to give the price to the charity, so as in effect to make a free gift of the land, it was held that the sale could not be supported, although the price had been ascertained by valuation, and the mortgagee debited himself with it in his account with the mortgagor (k). In such a case, it is to the vendor's interest to offer the price as much as possible.

Section 4.

As to general
points relating
to sales by
fiduciary
vendors.

Fiduciary
vendors: their
general
liability;

(4.) *As to general points relating to sales by fiduciary vendors.*

As a general rule, fiduciary vendors must show a marketable title—that is, a title which at all times and under all circumstances may be forced on an unwilling purchaser (l)—and are in all respects liable to a purchaser as if they were

(e) 32 & 33 Vict. c. 71, s. 23; which see as to the effect of disclaimer.

(f) Sect. 26.

(g) Rule 25 of Bankruptcy Rules July 7, 1871.

(h) *Re Wilson*, L. R. 13 Eq. 186.

(i) *Ex parte Loring*, L. R. 9 Ch.

Ap. 586.

(k) *Darcy v. Durrant*, 1 De G. & J. 546.

(l) See *Pryor v. Waddingham*, 10 Ha. 8; and see comments on this case in *Mullings v. Trinder*, L. R. 10 Eq. 449; *Hamilton v. Buckmaster*, L. R. 3 Eq. 523.

absolute and beneficial owners (m); except that they ordinarily enter into no covenants for title beside the covenant against incumbrances (n): and their liability extends to costs in a suit for specific performance (o): they have, however, a general right, except in cases of neglect (p) or misbehaviour, to recover such costs from the estate of their beneficiaries. So, damages recovered from assignees in bankruptcy, upon a contract for sale approved by the creditors, must be borne by the estate (q); but where a vendor resisted a suit for specific performance, and, after his bankruptcy, the resistance was improperly continued by the assignee, the latter was made liable for the costs incurred since the bankruptcy (r).

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as to
covenants,
and costs.

If one of two partners become bankrupt, the solvent partner, in winding up the affairs of the partnership, has a right to sell the partnership property to pay the partnership debts (s). But this power is an authority personal to him in his capacity of partner, and which he may exercise in that capacity, but cannot transfer to another (t). So, on the death of a partner, in the absence of any special provision to the contrary in the articles, the surviving partner seems to be able to sell, and to make a good title to the real estate of the firm.

Sale by
solvent or
surviving
partner on
bankruptcy
or death of
co-partner.

Where an equitable fee is conveyed to trustees for sale, the trustee of the outstanding legal estate must convey it to them without requiring the concurrence of their *cestui que trust*: but if he do more than merely so convey, he will be responsible for any breach of trust which he may thus facilitate (u).

Trustee of
legal estate
must convey
to trustees for
sale of equit-
able estate.

(m) Sug. 57; *White v. Foljambe*, 11 Ves. 348; *McDonald v. Hanson*, 12 Ves. 277.

(n) See HILL on Trustees, 269; *Worley v. Frampton*, 5 Ha. 560; vide *infra*, Ch. XII.

(o) *Edwards v. Harvey*, G. Coop. 40; *Hill v. Magan*, 2 Moll. 460.

(p) See *Pecora v. Ceeley*, 15 Beav. 209.

(q) See *Turner v. Harvey*, Jac. 178.

(r) *Foxwell v. Greatorex*, 33 Beav. 345.

(s) *Fox v. Hanbury*, Cowp. 445.

(t) *Fraser v. Kershaw*, 2 K. & J. 501.

(u) *Angier v. Stannard*, 3 Myl. & K. 566, 567.

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Sect. 4.

Sale by
trustees,
rarely
restrained by
injunction.

It is only upon strong grounds, and where irreparable injury is likely to be sustained by the parties interested, or a clear breach of trust is about to be committed, that the Court will, by injunction, stop an intended sale by fiduciary vendors (x).

Liability of
person
assuming to
act as trustee.

We may here remark, that if a person, either rightfully or wrongfully, assume to act as a trustee for sale, and in that character sign a receipt for purchase-money, he will be answerable for it, whether he himself receive it, or allow it to be received by a stranger (y).

Mortgagee
holding
surplus
purchase-
money.

A mortgagee selling under a power of sale, and retaining the surplus purchase-money unproductive in consequence only of disputes between subsequent incumbrancers, is not chargeable with interest on such surplus (z). The safest course to adopt in such a case would be to pay the money into Court under the Trustees' Relief Act.

Trustees
settling
doubtful
claims.

Although trustees for sale can seldom be advised, unless specially authorized, to run the risk of so doing, they will generally be allowed in their accounts, any sums which, in the exercise of a *bond fide* discretion, and acting under competent advice, they may have paid in order to effect a sale: as *e.g.* in satisfaction of a doubtful claim (a).

Trustee
cannot make
a professional
profit out of
the sale.

A trustee for sale, being a solicitor, or even one of several trustees professionally employed by his co-trustees, (b), cannot, nor can the firm of which he is a partner, unless expressly authorized by the trust instrument, charge his *cestuis que trust* with any costs other than costs out of pocket: and the same rule applies as against auctioneers (c); and, a mort-

(x) See *Ex parte Montgomery*, 1 Gl. & J. 838; *Marshall v. Stadden*, 7 Ha. 428; *Kensham v. Kulow*, 1 Jur. N. S. 974; *Wiles v. Graham*, 1 Eq. R. 348.

(y) *Backham v. Siddall*, 1 Mac. & G. 607; *Pearce v. Pearce*, 22 Beav. 248; *Hennessey v. Gray*, 33 Beav. 96.

(z) *Mathison v. Clark*, 4 W. R. 30.

(a) *Forslow v. Higginson*, 3 Jur. N. S. 476.

(b) *Broughton v. Broughton*, 5 De G. M. & G. 166.

(c) *Douglas v. Archbutt*, 2 De G. & J. 148.

gagee is considered to be a trustee for the mortgagor within the stringency of the rule (d). But an auctioneer or a broker, who is a mortgagee, may, it seems, deduct his commission if he sells under the direction of the Court (e). A trustee may, before he accepts the trust, stipulate for a remuneration for his services: but there must be no undue pressure on his part, and any bargain of this sort is discouraged by the Court (f).

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(5.) *As to purchases by trustees.*

Section 5.

Trustees are not justified in investing trust money in the purchase of real estate, unless specially authorized so to do by the instrument creating the trust (g): nor will the Court compel them to exercise a mere discretionary power of so investing (h): but, where the power is so worded as to be equivalent to a trust to invest upon a specified request being made, they are bound to act upon it, although the result may be—as in the case of a purchase of leaseholds—to benefit the requisitionist at the expense of other *cestuis que trust* (i), and although the trustees so purchasing are bound, as between themselves and the vendor, to enter into the ordinary covenants to pay the rent and perform the covenants in the lease. Of course trustees empowered to invest in the purchase of real estate could not, as a general rule (k), safely buy leaseholds, unless the power expressly authorized this particular mode of investment. It may not be useless to remark that the 4 & 5 Will. IV. c. 29, authorizing investments in Ireland under trusts to invest in England, &c., and Lord St. Leonard's Act, 22 & 23 Vict. c. 35, authorizing a trustee, unless expressly forbidden, to invest any trust fund on real

As to
purchases by
trustees.
They can so
invest only
under special
authority

(d) *Mathison v. Clarke*, 3 Drew. 3; 3 Eq. R. 127; *Kirkman v. Booth*, 11 Beav. 273.

(e) *Arnold v. Garner* 2 Ph. 231.

(f) *Lewin on Trusts*, 448.

(g) *Earl of Winchelsea v. Norcliffe*, 1 Vern. 434; *Hill on Trustees*, 375.

(h) *Lee v. Young*, 2 Y. & C. C. C. 532.

(i) *Beaumont v. Ashburnham*, 8

Beav. 322; *Cadogan v. Lord Essex*, 2 Dr. 227.

(k) But see, as to renewable Irish leaseholds, *Macleod v. Annesley*, 16 Beav. 600; as to the powers of corporations or trustees holding funds in trust for any public or charitable purpose to invest on real security, see now 33 & 34 Vict. c. 34.

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securities in any part of the United Kingdom (l), apply only to investments by way of security, and do not extend to purchases.

What
investments
authorized by
a trust to
purchase.

Improvement
of Land Act,
1854.

A trust to invest in the purchase of lands, to be settled to the same uses as the settled estates, does not authorize an expenditure upon substantial improvements (m). Now, trustees, who are in possession, are empowered by "the Improvement of Land Act, 1854" (n), to apply for and carry out, in accordance with the provisions of the Act, the several improvements mentioned in the 9th section, such as drainage, irrigation, planting, and the like.

Time for
investment.

Where trustees under a will are directed to invest in the purchase of land "with all convenient speed," twelve months from the testator's death will be deemed, as between the parties beneficially interested, a reasonable time within which to make the investment (o): but, as between the trustee and his *cestuis que trust*, the former, unless imperatively required so to do by the terms of the trust, is not bound to make, and would not be justified in making the purchase until a favourable opportunity occurs.

Devise of
estate A
conditionally/
on purchase of
estate B.

Where a testator devised estate A, conditionally upon his executors buying and "completing the purchase of" estate B, (which in that event was to go along with A,) within a specified period; but in case the executors "should not be able," within that time to purchase B, then estate A was to go in another specified direction, and the executors, although "able," neglected to purchase B within the specified period, it was held that A descended to the heir at law as undisposed of; and that the remedy (if any) of the devisees was against the executors personally (p).

(l) Sect. 32. Note the provision in this Act, that it shall not extend to Scotland, and see *Miles' Will*, 5 Jur. N. S. 1234.

(m) *Dunne v. Dunne*, 7 De G. M. & G. 207; *Dent v. Dent*, 30 Beav. 363;

re *Newman's Settled Estates*, L. R. 2. Ch. Ap. 521. *Vide infra*, Ch. XIII.

(n) 27 & 28 Vict. c. 114, s. 24.

(o) *Perry v. Warrington*, 5 Madd. 155.

(p) *Upjohn v. Upjohn*, 7 Beav. 59;

Where trustees are empowered to choose between several specified modes of investment, the Court will not interfere with a *bond fide* exercise of their discretion upon the ground that the result may be to vary the relative rights of their *cestuis que trust* (q).

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Bond fide
exercise of
discretion,
not interfered
with.

Where stock is sold for the purpose of investing the produce in land, the tenant for life is entitled to an allowance in the nature of an apportionment of the current half-year's dividend (r).

Apportion-
ment of
dividend on
stock sold
out.

In exercising the power or trust, any special directions in the trust instrument as to the peculiar mode or nature of the investment, must of course be strictly followed.

Directions
of trust
instrument to
be followed.

As a general rule, trustees for investment could not, unless specially authorized so to do, safely buy subject to special conditions restrictive of a purchaser's *prima facie* right to a marketable title or the usual evidence of title; nor accept a title not strictly marketable (s); but this must be understood merely as a rule for the general guidance of trustees, and it does not follow that a trustee purchasing a substantially safeholding, but not strictly marketable, title, is necessarily guilty of a breach of trust. In fact such purchases are constantly sanctioned by the Court of Chancery (t), whenever special circumstances exist which render the acquisition of the specific property a matter of importance to the trust. If, for instance, there is an estate already in

How far
bound to
require a
marketable
title.

the two properties above referred to as A and B were in fact undivided moieties of one estate.

(q) See *Mind v. Loman*, 20 Beav. 289; 7 De G. M. & G. 340, 351.

(r) *Lord Lonsborough v. Somerville*, 23 L. J., Ch. 646. *

(s) See now 37 & 38 Vict. c. 78, s. 1, substituting 40 years for 60 years as a sufficient root of title. See also Sects. 2 & 3 as to the power of trustees to purchase without excluding the application of the rules prescribed by the Act.

(t) *Re Sheffield & R. R. Co.*, 1 Sm. & G., Appendix IV.; and see *Ex parte Lowe*, 19 L. T. 310. In *Ex parte the Trustees of Hindley New Chapel*, V.-G. K. 29th June, 1855, the Court in directing an inquiry as to title directed that "in making such inquiry, E. M. of &c., shall be considered to have been seized for an estate in fee simple of the said plot of land at the date of his will and at the time of his death," which death occurred in 1820; but see *Meyrick v. Laws*, 34 Beav. 58.

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settlement, and small adjacent or neighbouring property, which has been or is likely to become a nuisance, comes into the market, the Court will generally sanction the purchase of such a property under a title very far from marketable. So too in buying a large estate the Court does not reject a property, desirable as a whole, merely because some inconsiderable portions, not essential from local position or other causes to the due enjoyment of the residue, are held under short or otherwise objectionable titles. On the other hand, the want of a safeholding title to a very minute acreage may be a reason for rejecting the purchase of a large estate. The greater the importance of the specific land to the rest of the property, the greater is the reason for buying it with almost any title if the rest of the estate is already in settlement; and the greater is the reason for rejecting the purchase *in toto* if the entire property is proposed to be taken. Trustees who have done of their own discretion that which the Court, if applied to, would itself have sanctioned, would, no doubt, be protected; but considering the exigencies of modern practice it seems desirable, in preparing wills and settlements, to give trustees for investment an express discretionary power to buy with less than a marketable title. It may, however, be observed that except under special circumstances, such as those above referred to, even such a power could not be acted on with perfect safety, and that the tendency of recent decisions and the recent practice of the Court, is towards an increased rather than a diminished particularity in investigating titles.

CHAPTER III.

Chap. III.

THE RELATIVE DUTIES OF VENDORS AND PURCHASERS PRIOR
TO THE SALE.

1. *As to disclosure or concealment of defects, incumbrances, &c., by vendor.*
2. *As to commendatory and other similar statements by vendor.*
3. *As to disclosure or concealment of advantages by purchaser.*
4. *As to depreciatory remarks or conduct by purchaser.*

WE may next advert to some general rules as to the relative duties of intending vendors and purchasers before entering into an agreement for sale: they relate to—

Preliminary negotiations; rules to be observed in.

1st. The disclosure or concealment of defects, incumbrances, &c., by a vendor:

2ndly. Commendatory and other similar statements by a vendor:

3rdly. The disclosure or concealment of advantages by a purchaser:

4thly. Depreciatory remarks or conduct by a purchaser.

- (1.) *As to the disclosure or concealment of defects, incumbrances, &c., by a vendor.*

Section 1.

As to disclosure or concealment of defects, incumbrances, &c., by vendor.
Vendor need not point

Defects in an estate may be either *patent*,—that is, such as may be discovered by ordinary vigilance on the part of a

Case III.
out patent
defect.

purchaser; e.g. the existence of an open footpath over the property (a), or the ruinous state of buildings (b); or latent,—that is, such as the greatest attention (c) would not enable him to discover; e.g. the existence of defects in a ship's bottom when sold afloat (d): it is held that a vendor is not bound to point out patent defects (e).

But must not
conceal or
divert atten-
tion from it.

But he must not, either during a treaty for, or while intending a sale, endeavour to conceal a defect, or to divert a purchaser's attention from it: in neither case, if proved, can he enforce the agreement in Equity (f): and in the first (as where a vendor, about to sell a house, purposely plastered and papered over a defect in the main wall (g),) the purchaser may recover his deposit at Law: and this, although the estate be sold "with all faults" (h): and where there was a contract, for a lease of "a newly-built house," to contain covenants on the part of the lessee to repair, and the lessee entered into possession, and shortly afterwards discovered that the house was defectively built, specific performance was not enforced against him; partly because some of the defects were latent; and partly because, in every contract of this sort, there is an implied undertaking on the part of the lessor to deliver the house in complete tenantable repair (i). Of course, if the defects are patent, and the purchaser, having notice of them, takes possession, he cannot resist the vendor's suit for specific performance (k).

Latent defects.

Case of vendor
selling by
agent and

But at Law, where the plaintiff, knowing that a nuisance existed which rendered his house unfit for a residence

(a) *Oldfield or Bowles v. Round*, 5 Ves. 508.

(b) *Grant v. Munt*, Coop. 177; *Keates v. Earl Cadogan*, 10 C. B. 591.

(c) *Sag*, 333.

(d) *Sag Mellish v. Motteux*, 1 Pea. N. P. C. 364.

(e) *Sag*, 2.

(f) *Sag*, 3; and *Shirley v. Stratton*, 1 Bro. C. C. 410; *Seall v. Attwood*, You. 490.

(g) 4 Taunt. 785.

(h) *Schneider v. Heath*, 3 Camp. 506; *Bagdale v. Walters*, 3 Camp. 156.

(i) *Tilley v. Clarkson*, 30 Beav. 419; 8 Jur. N. S. 163. But see *Oxford v. Frieland*, L. R. 2 P. C. 141, *et quere*.

(k) *Cook v. Wagh*, 8 Jur. N. S. 590.

employed an agent to dispose of it, without mentioning to him the nuisance, and the agent, upon being asked by the intended lessee whether there were any objection to the house, replied that there was not; a majority of the Court held, that this was no defence to an action for breach of the agreement to take the house (*l*); inasmuch as the plaintiff made no false representation, and the agent, although he made one, did not know it to be false. But this decision, from which Lord Abinger at the time dissented, can no longer be regarded as an authority (*m*). In a later case in the House of Lords, one of the Law Lords laid it down that if a vendor, aware of a serious nuisance affecting his property, entrusts the sale to an agent who is ignorant of it, and who, on being asked by a purchaser, innocently denies its existence, the contract ought to be avoided (*n*).

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not communicating to him material defect.

In a suit for specific performance, the decision in *Cornfoot v. Fowke*, would doubtless have been in favour of the lessee; and, in fact, a vendor cannot, although the estate be sold subject to all faults (*o*), rely on the aid of a Court of Equity, if he omit to disclose a *latent* defect which the purchaser has no means of ascertaining (*p*): although the rule would seem to be otherwise at Law, in the absence of fraud, if the sale be "with all faults" (*q*): and it has been held that in an action upon the contract, the representation of the agent, if made in the ordinary course of business (*r*), is the representation of the principal; but in an action on the case for deceit, the misrepresentation or concealment must be proved against the principal (*s*); but if the latter knowingly refer the purchaser to an ignorant agent (*t*), or knowingly allow him to remain under a delusion as to a

Of vendor not disclosing latent defects.

(*l*) *Cornfoot v. Fowke*, 6 M. & W. 358.

(*m*) See *Wilson v. Fuller*, 3 Q. B. (in error) 68.

(*n*) *National Exchange Co. v. Drew*, 2 Macq. 108, 145.

(*o*) Sug. 2.

(*p*) See *Lucas v. James*, 7 Ha. 410; *Tildesley v. Clarkson*, 30 Beav. 419.

(*q*) See *Epglehole v. Walters*, 3

Camp. 154, 155; *Early v. Garrett*, 9 B. & C. 929; *Pickering v. Dawson*, 4 Taunt. 779; *Freeman v. Baker*, 5 B. & Ad. 797; *Taylor v. Bullen*, 5 Exch. 779.

(*r*) See *Coleman v. Richter*, 3 C. L. R. 795.

(*s*) *Per Lord Campbell*, 1 H. L. C. 615.

(*t*) *Wilson v. Fuller*, 3 Q. B. 75.

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material fact (x)—for there may be a silence which is as eloquent as words—this will be equivalent to misrepresentation. In a recent case at Law (y), it was held that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract; and it was laid down by one of the judges, that a vendor is under no legal obligation to inform the purchaser that he is under a mistake, not induced by the act of the vendor (y). But these dicta, however applicable to the particular case, seem to be too wide as a general statement of the law. Many cases may be put in which mere passive acquiescence by a vendor in the self-deception of the purchaser, may render him as liable in Equity to have the contract rescinded, as if the mistake were originally due to his own contrivance; nor does it seem material, so far as the principle on which the relief is granted is concerned, that the purchaser might, with reasonable care or inquiry, have disabused his mind of the false impression; though the want of proper caution may be evidence to show that the vendor was not under the belief that the purchaser was deceived.

Recent valuation, &c., need not be disclosed.

But a vendor is not bound, even in Equity, to state that the property has been recently valued at a sum greatly less than the intended purchase-money; or that the tenant has complained of the rent as being excessive (z); or on the sale or lease of a mine, that he has himself worked it, but has abandoned the working as unprofitable, where the intending purchaser or lessee has had the opportunity of examination (a).

As to matters of title.

As to incumbrances and defects in title;—A vendor, so

(x) See *Hill v. Gray*, 1 Stark 454; *Kestis v. Earl Cadogan*, 10 C. B. 591; *Chitty on Contracts*, 5th ed. p. 593.

(y) *Smith v. Hughes*, L. R. 6 Q. B. 597.

(z) L. R. 6 Q. B. 607. As to the distinction which has been drawn between the concealment of extrinsic circumstances affecting the value of

the subject-matter of sale, or operating as an inducement to a contract, and the concealment of intrinsic circumstances appertaining to its nature, character, and condition; See *Story on Contracts*, sects. 517, et seq.

(b) *Abbott v. Newnham*, 4 De G. & S. 448, 460.

(c) *Haywood v. Cope*, 25 Beav. 140.

far as his *prima facie* liability in this respect is not negatived or restricted by the terms of the contract, must produce to the purchaser all such documents of title in his possession (b) or power as are necessary, in order to deduce a marketable title for the usual or stipulated period; and must inform him of all material facts not apparent thereon (c). Whether a purchaser, where a good sixty—or now forty—years' title (d) is shown, can, as a matter of right, unless precluded by condition, claim to inspect earlier title-deeds than those abstracted, is doubtful; but the better opinion seems to be, that as they clearly constitute a part of the title, he is entitled to inspect them, though perhaps at his own expense (e). The vendor, however, need not direct attention to defects, &c., apparent on the title deeds (f), nor to any matter of which the purchaser has actual or implied notice; for instance, upon the sale of leaseholds (g), the stringent or unusual character of the covenants need not be mentioned; as notice of the lease is notice of its contents. Thus, where property was described merely as held by the vendor as assignee of a lease, the purchaser was precluded from objecting to the title on the ground that the lease contained restrictive covenants (h). The notice, however, must be explicit; and a condition that no requisition shall be made in respect of a specified underlease, or any other underlease prior to a certain date, has been held not to preclude a requisition in respect of such a prior underlease, which was within the vendor's knowledge, but not specifically noticed in the contract (i): but a reasonable opportunity of inspection should be allowed the purchaser (k).

On sale of
leaseholds.

(b) 1 Jarm. C. by S. 63.

(c) Cooper, 312; and see *Gibson v. D'Este*, 2 Y. & C. C. 542; Sug. 246.

(d) See now 37 & 38 Vict. c. 78, sect. 3.

(e) *Parr v. Longrove*, 4 Drew. 170; and see Sug. 497.

(f) Sug. 6.

(g) *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394; *Walter v. Maunde*, 1 Jac. & W. 181;

Smith v. Capron, 7 Ha. 189; *Vignolles v. Bowen*, 12 Ir. Eq. 194; *Lewis v. Bond*, 18 Beav. 85; *Wilbraham v. Livesey*, 18 Beav. 206, 209. See there the distinction between an agreement to sell and an agreement to underlet.

(h) *Grosvenor v. Green*, 5 Jur. N.S. 117.

(i) *Edwards v. Wickwar*, L. R. 1 Eq. 68.

(k) *Brumfit v. Morton*, V.-C. S., 3 Jur. N.S. 1198.

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Misrepresentation not allowed.

And there must, of course, be no misrepresentation (*l*) upon the subject, or any artifice to divert attention: and if the vendor be informed by the purchaser of his object in buying, and the lease contain covenants which will defeat that object, mere silence will in Equity be equivalent to misrepresentation (*m*); unless indeed the purchaser enters into the contract after having actually examined the lease (*n*). But even misrepresentation, if unintentional, will not give the purchaser a right of action, after conveyance, if the sale be "with all faults" (*o*); and the purchaser may, even although the case be one of fraud, waive his remedy by continuing, after discovering the fraud, to deal with the property as owner (*p*).

Lease, how far notice.

And it may be doubted whether the above rule as to notice in the case of a lease (general as are the terms in which it is laid down (*q*)), would, if the question arose in a suit for specific performance, be held to apply so as to affect the purchaser with notice of any matter in a lease which is not in its nature incidental to such an instrument: whether, for instance, such implied notice, although extending to unusual covenants on the sale of the term, would also extend to a clause of pre-emption contained in a lease, upon the sale of the reversion (*r*); or would extend to fix him with notice of collateral facts, affecting the title and stated in such covenants (*s*).

(*l*) See *Van v. Corpe*, 3 Myl. & K. 269, 277; and the judgment in *Pope v. Garland*, 4 Y. & C. 401, 402, and cases cited; and see *Daskcomb v. Phillips*, 6 Jur. N. S. 363.

(*m*) *Flight v. Barton*, 3 Myl. & K. 282; and cases cited, *supra*, p. 84. n. (*u*).

(*n*) *Morley v. Clavering*, 29 Beav. 84.

(*o*) *Early v. Garrett*, 9 B. & C. 928.

(*p*) *Campbell v. Fleming*, 1 Ad. & El. 40.

(*q*) See *Sup. 7*.

(*r*) In *Marble v. Gutter*, 3 J. & L. 597, Sugden, Ch., intimates an opinion that the doctrine as to a lease

being notice has been carried too far; and see *Netherpe v. Holgate*, 1 Coll. 203; and *Flight v. Barton*, 3 Myl. & K. 282; but in *Vignolles v. Bowen*, 12 Ir. Eq. 194, a power in the lease for the tenant to cut timber was held to fall within the rule, see 197, and *Vaughan v. Magill*, 8. 207. And see further as to how far notice of a lease is notice of its contents as between vendor and purchaser, *infra* Ch. XV., sect. 5, and the very recent case of *Cubaferre v. Henry*, L. R. 9 Ch. Ap. 447.

(*s*) *Darlington v. Hamilton*, Kay, 550.

It is conceived, that upon the purchase of an estate in possession, those facts only are so far *material* as to render their disclosure obligatory upon the vendor, which affect his power to give to the purchaser that which he has contracted for; and that, if he buy subject to a known risk, circumstances which increase the mere amount of risk need not, in general, be stated: for instance, it has been held that the grantor of a personal annuity, or his agents, although bound to give honest answers to all relevant questions put by the intended grantee, need not voluntarily disclose the fact of his being already under large pecuniary liabilities (f); for it may be presumed that a person, who is obliged to raise money by granting annuities, is more or less involved: but where the consideration for the annuity is a *reversionary* interest belonging to the purchaser, the grantor is bound, in Equity, to communicate to the purchaser the unhealthy state of the proposed *cestui que vie* (v).

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What facts
are material
to title.

On purchase
of reversion

So if a vendor were to describe the property as let upon lease under certain specified covenants, beneficial to the reversion, but which he knew could not be enforced, this would probably be considered delusive (x).

Delusive
reference to
covenants.

The mere preparation of an annuity deed by the grantor's solicitor does not place him in any confidential relation towards the grantee, even although no other solicitor be employed in the transaction (y).

A solicitor, however, is liable, at Law (z) and in Equity (u), who by his misrepresentation induces a person to purchase his client's estate with a defective title.

Misrepresentation
by
vendor's
solicitor.

And now by a recent statute (b), any seller or mortgagee,

His liability
under 22 &
23 Vict. c. 35.

(f) *Adamson v. Evis*, 2 Russ. & M.

72. (u) *Davies v. Cooper*, 5 Myl. & C.

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(z) *Flint v. Woodin*, 9 Ha. 621.

(y) *Adamson v. Evis*, 2 Russ. & M.

72.

(a) Sug. 6.

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(a) *Arnot v. Biscoe*, 1 Ves. S. 96;

and see 6 Ves. 193; *Bowles v. Stuart*,

1 Sch. & L. 227; *Craig v. Watson*,

8 Beav. 427; but see also *Tyles v.*

Webb, 14 Beav. 14, 16. See, in

connection herewith, *Whitmore v.*

Mackison, 15 Beav. 126.

(b) 22 & 23 Vict. c. 35, s. 24.

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or his solicitor or agent, who conceals any settlement, deed, will, or other instrument material to the title, or any incumbrance from the purchaser (c), or who falsifies any pedigree, on which the title does or may depend, in order to induce him to accept the title, with intent to defraud, is guilty of misdemeanour, and also liable to an action for damages, at the suit of the purchaser or mortgagee; but no prosecution is to be commenced without the sanction of the Attorney-General, or, if that office be vacant, of the Solicitor-General.

Inquiry
should be
made of
supposed
adverse
claimant.

We may also, in connection with the above head, observe, that a purchaser suspecting that a third person has a claim on the estate, should (d), in the presence of witnesses (who may take notes of what passes) (e), inquire of him whether such be the fact, and the amount of the claim; at the same time stating his own intention to purchase (f): and if such person deny the existence of the claim, or assert that it is confined to a special sum, he will, in Equity, be bound by his denial or assertion (g): but, although bound to answer truly, if at all, a mortgagee, it would appear, may decline to answer, unless the intending purchaser offer to redeem him (h). But it has been more recently held, that where property cannot be obtained, without a particular person saying whether he claims it or not, it is not sufficient that he should hold his tongue, but he must state expressly whether he claims or not (i).

Inquiry and
notice on
purchase of
equitable
estate.

So, if the interest contracted for be merely equitable, the purchaser should inquire of the trustees in whom it is vested whether there are any and what incumbrances; and, on completion, should give them notice of the sale; and where

(c) The word "mortgagee" is inadvertently omitted in the statute; see now 23 & 24 Vict. c. 38, s. 8.

(d) Sug. 7; *Ibbotson v. Rhodes*, 2 Vern. 554.

(e) *Doe v. Perkins*, 3 T. R. 749; *Burrough v. Martin*, 2 Camp. 112; *Wood v. Cooper*, 1 Cam. & K. 645.

(f) 2 Vern. 554.

(g) *Pearson v. Morgan*, 2 Bro. C. C. 388; and see 6 Ves. 183, and 3 Ves. & B. 111.

(h) See *Bugden v. Bignold*, 2 Y. & C. C. 390.

(i) *Re Primrose*, 8 Jurist. N. 899, where the stranger was visited with costs.

an interest held under a derivative trust is purchased, the inquiry and notice should be made of, and given to, the trustees of the original trust, if the property remains under their control (k); and, though not absolutely necessary, it is desirable that in every case the notice should be formal (l). Such inquiry and notice are advisable for the sake as well of avoiding litigation with future, as of discovering the existence of present, incumbrancers; but on the purchase of an equitable estate in land, no priority is obtained thereby (m).

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Sect. 1.

Priority.

The trustees will be liable in Equity if they give false information, either fraudulently, or merely through forgetfulness (n).

Trustee liable
for false
information.

In every case the purchaser of a legacy should inquire whether it is free from all claims and demands in respect of the testator's estate (o); and, where the fund is in Court, the assignee should obtain a stop order, but this will not give him priority over an incumbrancer, who has already given notice of his charge to the trustees (p). The mortgagee of an undivided share of a fund in Court, who has obtained a stop order on the fund, has priority over a subsequent incumbrancer who obtains a stop order over the share, after it has been carried over to a separate account (q).

Purchase of
a legacy or
fund in Court.

(2.) *As to commendatory and other similar statements
by a vendor.*

Section 2.

It may be laid down, as a general rule, that mere expressions of praise or affirmations of value, such as, that an estate, sold as a renewable leasehold, is "nearly equal to

As to com-
mendatory
statements
by vendor.
Vendor not
bound by
mere puff.

(k) *Bridge v. Deacon*, L. R. 3 Eq. 664. See *Lee v. Howlett*, 2 K. & Jo. 531.

(l) *Lloyd v. Banks*, L. R. 3 Ch. Ap. 448, overruling in effect *Re Brown's Trusts*, L. R. 5 Eq. 88.

(m) *Vide infra*, Ch. XV. s. 2.

(n) *Burrows v. Lock*, 10 Ves. 470. See too *Slim v. Croucher*, 1 De G.

F. & Jo. 518; *Burry v. Croskey*, 2 Jo. & H. 1.

(o) *Noble v. Brett*, 24 Beav. 499.

(p) *Livesey v. Harding*, 23 Beav. 141; *Day v. Day*, 1 De G. & Jo. 144. See and consider *Dearie v. Hall*, 3 Russ. 1.

(q) *Lister v. Tidd*, L. R. 4 Eq. 462.

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freehold" (r); that land, in fact imperfectly watered, is "uncommonly rich water-meadow land" (s); or that a house of mean character is "a desirable residence for a family of distinction" (t); will not, however objectionable they may be in point of morality, render the contract voidable in Equity by the purchaser; although their tendency would doubtless be to indispose the Court to enforce specific performance at the suit of the vendor. Thus, where the lessor of a quarry stated that the limestone in it was "fit for the London market," (an expression restricted in the trade for lime of the best quality,) and it was in fact of a very inferior description, it was held that this, though a mere puffing statement on his part, was a bar to a decree for specific performance (u). So an untrue statement by a vendor, (though made in ignorance,) that the house which he was selling was not damp, was held fatal in Equity (x). But in each of these cases there was an actual mis-statement of facts: so also there was in the "water-meadow" case, the decision in which would probably not now be followed.

Unless amounting to mis-statement of facts,

And the rule, perhaps, extends to any statement by a vendor, which is equivalent to a mere expression of his own opinion, and does not amount to an assertion of an independent and ascertainable fact: such as, a statement on the sale of an advowson, that an avoidance is "likely to occur soon" (y); or on the sale of renewable leaseholds, that the fine payable is "small" (z): if a purchaser choose to rely on the vendor's opinion as to what is a small fine, or a probability of speedy avoidance, he does so at his peril.

which the purchaser does not know to be untrue.

So where the purchaser is aware that the vendor's laudatory statements are in fact untrue, and yet enters into the

(r) *Fenton v. Brown*, 14 Ves. 144.

(s) *Scott v. Hanson*, 1 Sim. 13, *sed quere*.

(t) *Magnan v. Fallon*, 2 Moll. 587.

(u) *Higgins v. Amels*, 2 J. & H. 460. See this case as to the narrow boundary which separates a puffing

speculative statement from misrepresentation; and see further as to misrepresentation Ch. XIV. a. 6, & Ch. XVIII. *infra*.

(x) *Stanger v. Bishop*, 29 L. T. 120.

(y) *Treng v. Newcome*, 3 Mer. 704.

(z) *Fenton v. Brown*, 14 Ves. 144.

contract, the maxim "*caveat emptor*" applies: as where property was described as standing on "a fine vein of anthracite coal," and it was within the purchaser's knowledge that it had been worked, and was almost exhausted (a).

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Sect. 2.

And in the strong case of the vendor of an annuity stating that the grantor (then in prison for debt and insolvent) "was a man of large property," he was held not liable to an action of deceit at Law (b): but this would probably not be followed at the present day.

What misrepresentation will sustain an action.

But, in Equity, where on the sale of a life interest, the particulars described the tenant for life as a very healthy gentleman aged forty-eight, whose life was insurable, and an insurance was guaranteed at five guineas *per cent.*, and it turned out that the vendors had recently insured the life at a rate less than five guineas *per cent.*, but exceeding the rate usually charged on healthy lives, their bill for specific performance was dismissed with costs, although the purchaser admitted that he knew five guineas to be more than the usual premium (c).

Effect in Equity of mis-statement as to life being healthy and insurable.

So on a sale of property in lease, a reference to the existence of covenants beneficial to the reversion, but which, to the vendor's knowledge, cannot be enforced, would probably be held to be deceptive (d). So, on a sale of a reversion in property, subject to an annuity, a condition that a recital in a former deed which stated that the annuity,—described merely as "a life annuity,"—had not been claimed for twenty-one years, should be evidence of its having determined, whereas, in fact, the annuity was for four lives, and was charged merely on the reversion, and was therefore not claimable during the period referred to, was held to be unfair, and void (e).

As to covenants.

As to cesser of charge.

(a) *Colby v. Gadsden*, 34 Beav. 416.

(d) *Flint v. Woodin*, 9 Ha. 621.

(b) *Dowes v. King*, 1 Stark. N. P.

(e) *Drysdale v. Mace*, 5 De G. M. &

C. 75.

G. 103.

(c) *Brouley v. Collins*, You. 317.

Chap. III.
SECT. 2.

Valuation
of estate by
surveyor.

Offer for
purchase by
third person.

And a false statement, by a vendor, of an independent fact,—as, that the property has been valued by a surveyor at a specified sum,—will, if relied on by the purchaser (*f*), enable him to avoid the contract at Law and in Equity (*g*); and might, perhaps, sustain an action at Law (*h*): but a vendor is not liable to such action for the false assertion that a third person has offered a specified sum for the estate (*i*). His statement, however, that he “will guarantee” a specified income to arise from the property, although not amounting to a contract, would, it appears, if made fraudulently, support an action for the tort (*k*).

The two former of the three cases last referred to seem to be distinguishable; for a purchaser might naturally consider the opinion of a surveyor to indicate something like the market value of the property, although he might be supposed to attach little importance to the bare offer by an individual, possibly made hastily, and soon repented of: though certainly, in the cited case, the purchaser seems to have been directly influenced by the mis-statement: and such a mis-statement would probably be a defence to a suit for specific performance.

Purchaser
when liable
at Law.

And a false statement that a specified rent is paid for the premises (*l*), has been held to subject the vendor to an action at Law, although the purchaser did not rely on his statement, but made inquiries of other persons; who, it is presumed, also deceived him. Nor, in a case of fraud, is the action necessarily barred by the fact of his having paid the purchase-money in a suit for specific performance (*m*).

Stranger when
liable for
mis-statement.

And the same liability is incurred by a stranger, who,

(*f*) See *Clapham v. Shillito*, 7 Beav. 148.

(*g*) *Buxton v. Lister*, 3 Atk. 386; *Ymell v. Atwood*, 1 You. 407; *Attwood v. Small*, 6 Cl. & F. 232; *Partridge v. Osborne*, 5 Ross. 195; Sug. 1; *Lord Brooks v. Rounthwaite*, 5 Ha. 298; *Pike v. Viger*, 2 Dru. & Wal. 150.

(*h*) *Powell v. Edmunds*, 12 East, 11.

(*i*) Sug. 2; 1 Rolle's Abr. 101, pl. 16.

(*k*) *Gerhard v. Bates*, 2 Fl. & B. 476.

(*l*) *Lynsey v. Selby*, Lord Raym. 1118; see *Dobell v. Stevens*, 3 B. & C. 633; *Wilson v. Fuller*, 3 Q. B. 65.

(*m*) *Jevons v. Stada*, 2 Esp. 573.

even from mere wantonness, intending to deceive, although without any view to gain, makes a false representation to a purchaser as to the value or rent of the property: nor is it material that the sale is by auction instead of private contract (*n*). Lord St. Leonards says (*o*), citing Sir W. Grant, "In cases of this nature it will be sufficient to show, 1st, that the fact as represented is false; 2ndly, that the person making the representation had knowledge of a fact contrary to it" (*p*). The rule is more broadly laid down by Mansfield, C. J., who says, that "it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false" (*q*): and the better opinion seems to be, that, in order to sustain an action at Law, it is sufficient to show *actual fraud*; consisting in either an assertion, (with or without motive,) of what the party knows to be false (*r*), or a communication, for a deceitful or fraudulent purpose of that which is in fact false, and which, although he may not know it to be false, he represents himself as knowing to be true (*s*).

There must
be actual
fraud; *semble*.

And it has been recently held at Law, that where a man, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*t*).

(*n*) *Bardell v. Spinks*, 2 Car. & K. 646.

(*o*) Sug. 4.

(*p*) *Burrowes v. Lock*, 10 Ves. 476; *Lake v. Bruton*, 8 De G. M. & G. 440.

(*q*) *Schneider v. Heath*, 3 Camp. 506; and see 1 Bro. C. C. 546; 3 Ves. & B. 111, and *Pearson v. Morgan*, 2 Bro. C. C. 388.

(*r*) See Lord Campbell's judgment in *Wilde v. Gibson*, 1 H. L. C. 633, and cases cited *infra*, n. (*s*); *Watson v. Poulson*, 15 Jur. 1111, Exch.

(*s*) See *Adamson v. Jarvis*, 4 Bing. 66; *Pasley v. Freeman*, 3 T. R. 51;

and 2 Smith's L. C. 71; *Gascoyne's case*, cited Dougl. 632; *Powell v. Edmunds*, 12 East, 6, 11; *Foster v. Charles*, 6 Bing. 396; *Corbett v. Brown*, 8 Bing. 33; *Polhill v. Walter*, 3 B. & Ad. 114; *Shrewsbury v. Blount*, 2 Man. & G. 475; *Freeman v. Cooke*, 6 Dow. & L. 187; *Taylor v. Ashton*, 11 M. & W. 401; *Evans v. Edmonds*, 13 C. B. 786; *Milne v. Marbood*, 15 C. B. 781.

(*t*) *Pickard v. Sears*, 6 Ad. & E. 469, 474. See, too, *Shepherd v. Gillespie*, L. R. 5 Eq. 293.

Chap. III. S. 1.

Must in
Equity make
good his
misrepresentation.

And in Equity, where a stranger has by such a fraudulent misrepresentation induced a party to enter into the contract, the Court will compel him to make good his misrepresentation to the best of his ability (u): and conduct which is calculated to induce a false belief as to the actual facts, may, if relied on, amount to a fraudulent misrepresentation, even though there may have been no intention to deceive; as e.g. where, on full information being required, documents, which are known to be insufficient, are furnished as containing it (x).

Guarantee of
solvency must
be in writing.

A representation that a man is able to answer an obligation is not binding unless in writing (y).

Rescinding
contract in
Equity.

Where either of the parties to the contract has procured the other to enter into it by means of a misrepresentation or concealment, which a Court of Equity considers to be actually fraudulent, (z) it will not merely decline to enforce, but will even rescind, the contract (a), unless, it seems, the

(u) *Pulford v. Richards*, 17 Beav. 95.

(x) *Conybeare v. New Brunswick, &c., R. Co.*, 1 De G. F. & Jo. 578; *New Brunswick, &c., R. Co. v. Mugeridge*, 1 Drew. & Sma. 303, which see as to what concealment or ambiguity will amount to misrepresentation.

(y) 9 Geo. IV. c. 14, s. 6: see *Haslock v. Ferguson*, 7 Ad. & El. 86; *Swann v. Phillips*, 8 Ad. & El. 457; *Dessaux v. Steinkeller*, 6 Bing. N. C. 84 (representations of the credit of a firm, by a partner); and see *Semple v. Pink*, 1 Exch. Rep. 74; 16 L. J. N. S. 237; and see now 19 & 20 Vict. c. 97, s. 3.

(z) As to what fraud is sufficient to entitle the interference of the Court, see *Torrance v. Bolton*, L. R. 14 Eq. 124; affirmed, L. R. 8 Ch. App. 118; see p. 124, where Lord Justice James lays it down that the Court will interfere "where it is unconscionable

for a person to avail himself of the legal advantages which he has obtained" by his misrepresentation or concealment.

(a) See *Turner v. Harvey*, Jac. 169; *Edwards v. M'Leay*, Coop. 308; *Berry v. Armistead*, 2 Ke. 221; *Lovell v. Hicks*, 2 Y. & C. 46; *Stalnbank v. Fernley*, 9 Sim. 556; *Attwood v. Small*, 6 Cl. & F. 232, 395, 444; *Gibson v. D'Ete*, 2 Y. & C. C. C. 542; *Wilde v. Gibson*, 1 H. L. C. 605, 635; *Reynold v. Sprye*, 8 Ha. 222; 1 De G. M. & G. 680; *Pulford v. Richards*, 17 Beav. 95; *Jennings v. Broughton*, 17 Beav. 234; 5 De G. M. & G. 126, affirmed 23 L. J. 999; *Bartlett v. Solomon*, 6 De G. M. & G. 33; 1 Jut. N. S. 277; *Conybeare v. New Brunswick R. Co.*, 1 De G. F. & Jo. 578; *New Brunswick, &c., R. Co. v. Mugeridge*, 1 Drew. and Sma. 303; *Torrance v. Bolton*, L. R. 14 Eq. 124; affirmed L. R. 8 Ch. App. 118.

party defrauded elect to have the misrepresentation made good (b): and, in a suit by a purchaser, will direct his deposit to be returned, and declare a lien for it on the property (c): but it cannot award damages by way of compensation to the plaintiff under its general jurisdiction (d): nor does Lord Cairns' Act, 21 & 22 Vict., c. 27, apply to a case where the suit is not for the specific performance, but for the rescission of the contract; but it is conceived that under the Supreme Court of Judicature Act, 1873, when such Act comes into operation, not only may the contract be rescinded on the ground of misrepresentation, but in an appropriate case damages also may be awarded by way of compensation to the plaintiff.

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A voidable contract may be set up by a subsequent confirmation, or even by mere waiver or abandonment of the right to rescind it (e); but the confirmation must be clear, amounting, in fact, to a new contract by reference to the terms of the original contract, when such original contract is tainted with actual fraud (f). But in the absence of fraud, the Court will not entertain a suit for the delivery and cancellation of the contract, except perhaps in cases where to allow it to remain in the defendant's possession might prejudice the plaintiff's title (g).

How voidable
contract may
be set up.

If the vendor procure payment of a deposit from the purchaser, by means of a false and fraudulent representation as to the state of the property, he may, it seems, be convicted of obtaining money by false pretences (h).

Vendor's
liability for
obtaining
money on
false pre-
tences.

(b) *Rawlins v. Wickham*, 3 De G. & Jo. 304.

(c) *Torrance v. Bolton*, *ubi supra*.

(d) See *Gwillim v. Stone*, 14 Ves. 128; and *Sainsbury v. Jones*, 1 Myl. & C. 1.

(e) See *Cole v. Gibbons*, 3 P. Wms. 290; *Chesterfield v. Jansson*, 2 Ves. S. 125; *Morse v. Royal*, 12 Ves. 355; *Roche v. O'Brien*, 1 Ba. & B. 335; *Campbell v. Fleming*, 1 Ad. & E. 40;

Attwood v. Small, 6 Cl. & F. 424, 432; *Flint v. Woodin*, 9 Ha. 618.

(f) *De Montmorency v. Devereux*, 7 Cl. & F. 225, 230, *vide supra*, p. 49.

(g) *Onions v. Cohen*, 2 H. & M. 354; and see the V. C.'s remarks on *Gwillim v. Stone*, 14 Ves. 128.

(h) *Reg. v. Burgon*, 2 Jur. N. S. 596, case of mortgagees; *Reg. v. Rastbuck*, *ib.* 597.

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Para. 2.

Misrepresentation by a public company.

The same rules as to false or deceptive statements, which are applicable to a contract between individuals, have an equal application to a contract between an individual and a public company. If a person has been induced to take shares in a company by means of a fraud, which is in point of law the fraud of the company, he may repudiate the shares as between himself and the company, though as regards creditors he will still, under the present system of winding up, be liable to be placed on the list of contributors (*i*). The right, however, to be relieved of shares on the ground of misrepresentation in the prospectus, may be lost by slight delay or acquiescence (*k*).

Innocent misrepresentation binds in equity.

And in Equity a misrepresentation, although made in perfect good faith, if made in order to induce others to act upon it, or under circumstances in which the party making it may reasonably suppose that it will be acted on, *prima facie* binds the party making it, as between himself and those whom he has thus misled (*l*).

Sect. 3.

As to concealment, &c., by purchaser, He need not disclose concealed advantages.

(3). *As to concealment and disclosure of advantages by the purchaser.*

A purchaser need not disclose any fact, unknown to the vendor, which increases the value of the property itself; e.g., the existence of a mine (*m*); or the existence of negotiations for an advantageous sale of part of a mortgaged estate, supposed to be a short security, upon the purchase by the first mortgagee of a previous charge for less than its nominal value (*n*). Where, however, the owners of a colliery entered into a contract with an adjoining landowner for the purchase

(i) *Central R. Co. of Venezuela v. Kisch*, L. R. 2 E. & Ir. App. 99; *Re Ross River Mining Co.* L. R. 2 Ch. Ap. 604, 609; *Ross v. Estates Investment Co.*, L. R. 3 Eq. 122; L. R. 3 Ch. Ap. 642; *re Estates Investment Co., McNield's case*, L. R. 10 Eq. 503.

(k) *In Heymann v. European Central R. Co.*, L. R. 7 Eq. 144; *Scholey v. Central R. Co. of Venezuela*, L. R.

9 Eq. 266 (*n*).

(l) *West v. Jones*, 1 Sim. N. R. 205, 308; *Att.-Gen. v. Stephens*, 1 K. & J. 748.

(m) 3 Esp. C. C. 420; Jac. 178: see and consider our Lord's parable of the treasure hid in a field, Matt. c. xiii. 44.

(n) *Dolman v. Nokes*, 22 Beav. 402.

of his estate without disclosing the fact, of which he was ignorant, that they had without authority got a considerable quantity of coal from under it, the Court in a suit by the purchasers refused to enforce the contract, although there was no proof of undervalue; and, in a suit by the landowner, held that he was entitled to the value of the coals got from under his land (o); and the case was attempted to be distinguished from those which we have just been considering on this ground, viz., that where a person, having committed a serious trespass on his neighbour's land, proposes to buy it so as to screen himself from the consequence of his own wrongful act, the proposal which he makes is not a simple proposal for the purchase of the property, but involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware (p); but whether the distinction rests on any solid ground seems doubtful.

But anything, even a mere word, which tends to mislead the vendor upon such a point, will deprive the purchaser of the assistance of a Court of Equity (q); and would, it is conceived, be a fraud, avoiding the contract at Law, at the election of the vendor.

But must not
mislead
vendor.

And a purchaser is bound, in Equity, to disclose any fact, unknown to the vendor, which increases his *interest* in the property; e.g., the actual (r), or imminent (s) death of a prior life tenant: and the same rule has prevailed at Law, upon the sale of a life policy (t).

Nor conceal
fact increasing
vendor's
interest.

(4). *As to depreciatory remarks, &c., by the purchaser.*

Section 4.

A purchaser who has misrepresented the property to a third person desirous of purchasing it, cannot enforce the

As to de-
preciatory
remarks, &c.,
by purchaser.
Their effect
in Equity;

(o) *Phillips v. Homfray*, L. R. 6 Ch. Ap. 770; *sed. quare*.

(contract rescinded); and see *Darves v. Cooper*, 5 Myl. & C. 270.

(p) See Lord Hatherley's judgment, p. 779.

(s) *Ellard v. Lord Llandaff*, 1 Ba. & B. 241.

(q) *Jac*. 178.

(t) *Jones v. Keene*, 2 Moo. & R.

(r) *Turner v. Harvey*, *Jac*. 169

348.

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contract in Equity (u) : so, at Law, when a purchaser, by his statements in the sale room, prevented others from bidding, the sale was held voidable by the vendor (x).

and at Law.

A purchaser, however, is not liable to an action at Law for having depreciated to the vendor the value of the property, or its chance of sale (y) : nor will an action lie against a stranger for preventing a sale by giving notice of his claim upon the estate, unless it be shown that such notice was given maliciously (z) : and, in any case, in order to support an action for slander of title, the plaintiff must prove *fraud*, *malice*, and *special damage* (a). If the defendant acted *bona fide*, the action cannot be maintained, although a man of sound sense and a knowledge of business would not have uttered the slander (b).

Slander of
title by
stranger.

Agreement
with, not to
bid against,
legal.

It appears that an agreement between two persons, not to bid against each other at an auction, is legal ; and forms a valuable consideration for an agreement giving to the party withdrawing his opposition at the auction a right of pre-emption over other property (c) ; and such an agreement has been held valid, where the sale was made by order of the Court (d).

Effect of
written
agreement on
preliminary
negotiations.

It may be remarked, that, when a written agreement between the parties has once been signed all previous representations, unless fraudulent (e), become immaterial (f) ; except for the purpose of defence in Equity (g), or of rebutting a defence, and so maintaining the written contract.

(u) *Howard v. Hopkins* 2 Atk. 371; *Buxton v. Lister*, 3 Atk. 353, 386.

(x) *Fuller v. Abrahams*, 3 Bro. & B. 116 ; and see *Mason v. Armitage*, 13 Ves. 38.

(y) *Vernon v. Keys*, 12 East, 632 ; see p. 633.

(z) See *Marygrove v. Le Breton*, 4 Burr. 3423 ; *Malachy v. Soper*, 3 Bing. N. C. 371, 382 ; *Blackham v. Pugh*, 2 C. B. 411, 420, 424 ; *Pater v. Baker*, 5 C. B. 391, 392, 396 ; Sug. 357.

(a) *Brook v. East*, 4 Exch. 521 ; see *Dignell v. Dummer*, 3 Hurl. & N. 217.

(b) *Pitt v. Donovan*, 1 M. & S. 639.

(c) *Galtsoy v. Emuss*, 1 Coll. 243.

(d) *Re Curran's Estate*, 4 Jur. N. S. 1290.

(e) *Super*, note 1.

(f) *Philbrick v. Downes*, 4 Taunt. 773, 782 ; *Phillips v. Barber*, 16 M. & W. 46, 74.

(g) *Hayman v. Hare*, 1 H. Bl. 664.

CHAPTER IV.

Chap. IV.

AS TO PARTICULARS AND CONDITIONS OF SALE.

1. *General matters relating to particulars and conditions, and their construction.*
2. *Preparation and contents of particulars.*
3. *As to conditions.*
4. *As to what special conditions are generally requisite in various specified cases.*
5. *General remarks on special conditions.*

(1.) PARTICULARS and conditions of sale, if intended to exclude the purchaser from that to which he would otherwise be entitled, must be expressed in terms most clear and unambiguous (a); if there be any chance of reasonable doubt or misapprehension as to their meaning, the construction will be in his favour (b). And the same principle of construction, as regards questions of title, applies as well to private contracts for sale and purchase, settled on behalf of both parties, as to ordinary conditions for sale by auction, which, of course, are settled exclusively on behalf of the vendor (c).

Section 1.

Doubtful particulars, conditions, and contracts construed strictly against vendor.

But general expressions may not, it seems, be so read by a purchaser as to make them contravene a well known rule of law, or universal custom, if they be capable of bearing a

But not so as to contravene rule of law or

(a) *Symons v. James*, 1 Y. & C. C. 490.

(b) *S. C.*; *Taylor v. Martindale*, *ib.* 661; *Seaton v. Mapp*, 2 Coll. C. C. 562; *Nouvelle v. Flight*, 7 Beav. 521; *Smith v. Ellis*, 14 Jur. 682; *Graves v. Wilson*, 25 Beav. 290; *Drumst v. Merton*, 3 Jur. N. S. 1198; *Jackson*

v. Whitehead, 28 Beav. 154; *Swainland v. Dearsley*, 29 Beav. 430.

(c) *Rhodes v. Ibbetson*, 4 De G. M. & G. 787; *Bulkeley v. Hope*, 1 Jur. N. S. 864; and see as to vague conditions, *Taylor v. Gilbertson*, 2 Dra. 391; *Cruse v. Nowell*, 2 Jur. N. S. 536.

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universal
custom.

modified meaning; as where the particulars stated that the fines of a manor about to be sold were arbitrary, it was, in the opinions of Lords *Campbell* and *Brougham*, no misdescription, when it was shown that (the fines on alienation being arbitrary,) those on the admission of a widow to free-bench were certain; inasmuch as such latter fines *never are* arbitrary (*d*).

And may bind
purchaser
whose atten-
tion is
directed to
their objec-
tionable
character.*

And conditions such as would not, under ordinary circumstances, be enforced in Equity, may bind a purchaser if his attention be drawn to their objectionable nature before he buys; as where, upon a sale under catching conditions as to title, he inquired, "whether a good and marketable title could be made?" and the auctioneer and vendor's solicitor refused to insert any such statement in the contract, but said that a good title could be made *under the existing conditions*, the purchaser was held to his bargain (*e*).

Vendor's
undertakings
in, strictly
construed.

Any undertaking on the part of the vendor will, it is conceived, as a general rule, be construed strictly in favour of the purchaser; in fact, where, in an agreement for a twenty-one years' lease of a house in Highbury Place, it was stipulated, that there should be a "covenant by lessor for quiet enjoyment by the tenant, and not to let any of the land near Highbury Place, for the purpose of making and burning bricks," it was held by V.-C. *Wigram*, that the lessor must show his title to bind the adjoining land by such a covenant during the proposed term; although it appeared, on the face of the agreement, that the lease was to be granted under a power contained in a will (*f*): but this decision was reversed by Lord *Cottenham* (*g*).

Cannot be
affected by
verbal de-
clarations :

As a general rule, the particulars and conditions cannot be contradicted, explained, or added to, by any verbal declarations at the time of sale (*h*): evidence of such declarations

(*d*) *White v. Cuddon*, 8 Cl. & F. :
see pp. 786 and 796.

(*e*) *Hyde v. Dallaway*, 6 Jur. 119;
4 Beav. 606.

(*f*) *Danes v. Betts*, 12 Jur. 412.

(*g*) *S. C.*, 12 Jur. 709.

(*h*) 1 Jac. & W. 639; Sug 15;
Higginson v. Clowes, 15 Ves. 521; and

is inadmissible at Law on behalf of either plaintiff or defendant (i), and in Equity on behalf of the plaintiff; even although the defendant (the purchaser) have agreed in to abide by the conditions and declarations at the sale (k); but in Equity such evidence is admissible for the purposes of defence (l).

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Except for
purpose of
defence in
Equity.

And the same rules apply between the original purchaser at a sale, and his sub-purchaser (m).

Case of sub-
purchaser.

When the auctioneer has, at the sale, made verbal declarations at variance with the particulars, &c., a purchaser would seem to be under this disadvantage; viz., that if the Court were clearly satisfied that he heard and understood the effect of the verbal declarations, he probably would not obtain a decree for specific performance *without* the variations, supposing them to be to his prejudice (n); nor, on the other hand, could he enforce specific performance *with* the variations, supposing them to be in his favour: a purchaser buying under such circumstances, should have the requisite alterations made in the printed particulars or conditions before the agreement is signed by himself and the vendor: although, in cases where the vendor is selling under a power or trust, this might occasionally give rise to questions with the parties beneficially interested.

Verbal decla-
rations at
sale.

Should be
reduced into
writing.

But any particular personal information given to the purchaser, as to incumbrances, or the title, or even declarations

Particular
information
to purchaser,

see *Manser v. Back*, 6 Ha. 443; *Goss v. Lord Nugent*, 5 B. & Ad. 58; 2 N. & M. 28.

(i) See *Gunnis v. Erhart*, 1 H. Bl. 289; *Greaves v. Ashlin*, 3 Camp. 426; *Ford v. Yates*, 2 Mann. & G. 549; *Eden v. Blake*, 13 M. & W. 614, 617; *vide infra*, Ch. XVII.; *Powell v. Edmunds*, 12 East, 6.

(k) *Higginson v. Clowes*, 15 Ves. 521; *Jenkinson v. Pepps*, cited 15 Ves. 521; *Clowes v. Higginson*, 1 Ves. & B. 524; *Fife v. Clayton*, 1 C. P. C. N. R. 352. But see *Swaishand v. Dearsley*,

29 Beav. 430, where evidence of these declarations appears to have been improperly admitted on behalf of the plaintiff.

(l) *Swaishand v. Dearsley*, 29 Beav. 430.

(m) *Shelton v. Livius*, 2 Cr. & J. 411.

(n) *Gunnis v. Erhart*, *supra*.; see *Pember v. Mathers*, 1 Bro. C. C. 52; *infra*, Ch. XVIII.; *Ogilvie v. Foljambe*, 8 Mer. 53; *Woodward v. Miller*, 2 Coll. 279; *Sug. 16*; *Farebrother v. Gibson*, 1 De. G. & Jo. 662.

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in Equity.

on such points by the auctioneer, may be given in evidence by vendor or purchaser as a defence in a suit for specific performance according to the particulars, &c. ; but, as a general rule, do not seem to be admissible on behalf of the plaintiff (o). But in one case where a house was described in the particular as in the occupation of an insurance company under a lease, parol evidence was admitted on behalf of the plaintiff to show that prior to the sale the defendant, the purchaser, was informed that the lease was granted not to the company, but to trustees for them (p).

Alteration
of copies, and
unaltered
copy signed.

Where an alteration was made in the printed particulars, and the altered copies were first produced in the auction-room on the morning of sale, and the auctioneer, having read and sold by an altered copy, inadvertently signed agreements indorsed on unaltered copies, it was held, that a purchaser could not enforce specific performance according to the particulars as originally published, although it did not appear that he had heard the auctioneer read the altered copy, or had any knowledge of the alteration (q).

Sale "with-
out reserve ;"

In Equity .

A recent statute (r) has made it unlawful, in every case where a sale is stated to be without reserve, for the vendor to employ a person to bid at the sale, or for the auctioneer to take knowingly any bidding from such person. Prior to this enactment if the sale was stated to be made "without reserve," the employment of a bidder to protect the estate (s), or any private arrangement equivalent to a reserved bidding (t), would have vitiated the sale in Equity : but it was generally considered that where the sale was not expressly made "without reserve," a single bidder was allowable in Equity to prevent a sale at an undervalue. But in a late case (u), the validity of this practice, and the authority on which it was supposed to rest, were both questioned. At Law, after a

(o) 15 Ves. 528 ; 1 Ves. & B. 524.

(p) *Farbrother v. Gibson*, 1 De G. & Jo. 502.

(q) *Munster v. Duck*, 6 Ha. 448.

(r) 30 & 31 Vict. c. 43.

(s) *Mendham v. Turner*, 5 Madd. 84 ;

assuming, of course, that the bidder acts.

(t) *Robinson v. Wall*, 10 Beav. 61 ; 2 Ph. 372.

(u) *Mortimer v. Bull*, L. R. 1 Ch. Ap. 10, 14, 18, and *vide infra*, Ch.

V. s. 5.

considerable fluctuation of the authorities, the doctrine was carried still further than in Equity; and in the absence of a stipulation, expressly reserving the right, the employment of a single puffer would have vitiated the sale (x). The recent statute has put an end to this conflict between the rules of Law and Equity; and has provided that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved (y). The omission of such a statement from the particulars or conditions is not provided for, but it is conceived that in such a case the sale would be treated as without reserve.

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Sect. 1.
At Law.

The provisions of the Act, it will be observed, are expressed in the alternative; but it seems that on the same sale, not only may a reserved price be fixed, but a right of bidding may be also reserved (z). Where however the sale is made "subject to a reserved bidding," a person cannot be employed to bid up to the reserved price, unless the right to do so is expressly stipulated for (a).

A person not a party, but consenting to the sale, may be bound by statements in the conditions or particulars derogating from his rights over other property (b).

Rights of
stranger—
how bound

(2). *As to the preparation and contents of the particulars.* Section 2.

The particulars should fairly and accurately (c) describe the estate: if, although grammatically correct, they are so obscure as to be likely to deceive an ordinary purchaser, the sale will

Particulars.
Description
in, to be
fair and
clear.

(x) See *Thomett v. Haines*, 15 M. & W. 371, 372, and *Mortimer v. Bell*, *supra*, where Lord Cranworth treats the rule as well settled; and *vide infra*, Ch. V. s. 5; and cases there cited; and 30 & 31 Vict. c. 48, sect. 4.

(y) 30 & 31 Vict. c. 48, sect. 5, and VOL. I.

see as to "land" the interpretation clause.

(z) *Gilliat v. Gilliat*, L. R., 9 Eq. 60.

(a) *Gilliat v. Gilliat*, *ubi supra*.

(b) *Wood v. Manley*, 11 Ad. & E. 34.

(c) See *Cokerley v. Williams*, 1 Ves. J. 210, 213.

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be liable to be set aside (d); nor is it sufficient for them merely just to tell what is not actually untrue, omitting a great deal that is true, and leaving the purchaser to ascertain the existence of any error or omission; but they should describe everything which it is material for him to know in order to judge of the nature or value of the property (e); and the vendor, before he sells, is bound to make himself acquainted with its peculiarities and incidents (f), so far as may be necessary in order to avoid serious error in the description: and a plan if referred to in aid of the description should be perfectly accurate; thus where the sale plan showed what was an apparent, but not the real boundary of the property, and a personal inspection by the purchaser failed to correct the misapprehension caused by the plan, the vendor's bill for specific performance was dismissed (g). On the sale of a partial interest, any substantial (h) variation from the description will, at Law as in Equity, render the contract voidable (i).

What Particulars should state.

It is the proper office of the particulars to describe the subject-matter of the contract, and of the conditions to state the terms on which it is sold (j); and the omission from the particular of some fact which ought to have been stated there will not necessarily be remedied by a statement of it, however explicit, in the conditions; unless of course it can be shown that the purchaser's attention was expressly directed to it. Thus, where a printed particular described the property as an immediate absolute reversion falling into possession on the death of a lady aged 70, and it appeared

(d) *Taylor v. Martindale*, 1 Y. & C. C. C. 658; *Symons v. James*, ib. 490; *Martin v. Cotter*, 3 J. & L. 496; *Swaisland v. Dearsley*, 29 Beav. 430; as to annual value, see *Lovndes v. Lane*, 2 Cox, 363; and *White v. Cuddihy*, 8 Cl. & F. 766: and as to a deceptive statement as to occupancy, *Lushan v. Reynolds*, Kay, 52.

(e) *Beckett v. Beckett*, L. R. 8 Eq. 100.

(f) See *Brinkley v. Pinner*, 2

Dre. 430.

(g) *Denny v. Hancock*, L. R. 6 Ch. Ap. 1.

(h) See *Edworth v. Hamell*, 4 Camp. 140; and in Equity, *Vignolles v. Boman*, 19 Ir. Eq. 194.

(i) See *Thompson v. Miles*, 1 Esp. 184; *Parry v. Nightingal*, 2 Esp. 689; *Hayden v. Foulton*, 1 Peak. 253; *Atkins v. Allen*, 1 Camp. 118.

(j) See *V. C. Mordaunt*, in *Torrance v. Bolton*, L. R. 14 Eq. 190.

from the written conditions, which were read but not distributed at the sale, that the property was sold subject to three mortgages, the purchaser, who did not understand that he was buying an equity of redemption, was held entitled to have his contract rescinded, and under the special circumstances the vendor was condemned in costs (*k*).

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An agreement to sell land is, in the absence of any restrictive expressions, an agreement to sell the whole of the vendor's interest therein (*l*); and such interest, if not described, will be inferred to be an estate in fee simple (*m*): but it may be shown, even in support of a bill for specific performance, that the purchaser knew the actual nature of such interest (*n*); and, unless the contrary be expressed, the interest offered for sale, (whether it be absolute or qualified,) will be presumed to be accompanied by all those advantages which are legally incidental to it (*o*). Therefore, an infringement of the rule, *Cujus est solum ejus est usque ad cælum* (*p*), is (if not mentioned in the particulars,) sufficient to render the contract voidable by the purchaser (*q*): so, where there was no title to an underground cellar, the defect was held fatal (*r*): so, where there was a want of title to such a proper access to a house as, under the description, the purchaser was justified in expecting (*s*); so, where on a sale of arable land no right of way was shown thereto for carts and carriages (*t*); so, where on a sale of ground-rents proper powers of distress and entry could not be conferred on the purchaser (*u*). And where a lessee agreed to buy the house

Agreement to sell land, what it includes.

All legal incidents presumably accompany estate.

(*k*) *Torrance v. Bolton*, L. R. 14 Eq. 124; affd. L. R. 8 Ch. Ap. 118.

(*l*) *Bower v. Cooper*, 2 Ha. 408.

(*m*) *Hughes v. Parker*, 8 M. & W. 244; and see *Catell v. Corvall*, 4 Y. & C. 228, 236; Sug. 298.

(*n*) See *Cowley v. Watts*, 17 Jur. 172; *Cox v. Middleton*, 2 Dre. 217.

(*o*) *Skull v. Glenister*, 16 Q. B. N. S. 81; 33 L. J. C. P. 185; case of right of way appurtenant, though not mentioned, passing by a parcel demise.

(*p*) "*Et ad inferos*;" see *Lexis v.*

Braithwaite, 2 B. & Ad. 437; *Keyes v. Powell*, 2 El. & B. 132; *Sparrow v. Oxford, &c. R. Co.*, 2 De G. M. & G. 108.

(*q*) *Pope v. Garland*, 4 Y. & C. 403.

(*r*) *Whittingdon v. Corder*, 16 Jur. 1034.

(*s*) *Stanton v. Tattershall*, 1 Sm. & G. 529.

(*t*) *Denne v. Light*, 3 Jur. N. S. 627; see also *distinguish Curling v. Austin*, 2 Dr. & Sm. 129.

(*u*) *Langford v. Selmes*, 3 K. & J. 220.

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leased to him, and described as being then in his own occupation, it was held that he was not bound to complete except upon the terms of his having a cellar which passed by the lease, but which was not in his occupation at the date of the contract (x).

**Minerals
when not
included.**

But an agreement to sell land to a Railway (y) or Waterworks Company (z), if subject to the provisions of the late Consolidation Acts, does not include the minerals (u), unless they are expressly comprised in the purchase: and the mere agreement to sell a house and land has been held not to pass the right to an unascertained allotment under a recent inclosure Act (b); but by the General Inclosure Act (c) it is now provided that if an interest in land is sold before the allotment in respect of it is made, the allotment shall be made to the purchaser.

Allotments.

**Permanent
charges and
restrictive
rights
should be
noticed.**

Any charge upon the estate, or right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated in the particular; or the omission may, in many cases, render the sale voidable by the purchaser (d) *eg*, a right of sporting over the estate (e), a right of common every third year (f), a right to dig for mines (g), a liability to repair the church chancel (h), or, (it is conceived,) a liability to heriots—unless capable of being immediately enfranchised (i)—or any other right or liability which cannot fairly admit of compensation, would, if undisclosed, have that effect.

(x) *Whittington v. Corder*, *supra*.

(y) 8 Vict. c. 20, s. 77.

(z) 10 Vict. c. 17, s. 18.

(u) Stone is such as between vendor and purchaser for the purposes of an exception of minerals; See *Bell v. Wilson*, L. R. 1 Ch. Ap. 308, reversing a decree of V.-C. Kindersley, 2 Dr. & Sm. 395; so, also, china clay, *Hezt v. Gill*, L. R. 7 Ch. Ap. 699; but the surface owner was held entitled to an injunction against working the clay so as to destroy the surface.

(b) *Fife v. Olafson*, 1 C. P. C., N. R. 315.

(c) 8 & 9 Vict. c. 118, sect. 84.

(d) Sug. 5, 6, 311, 312; and see *Torrance v. Bolton*, L. R. 14 Eq. 124; L. R. 8 Ch. Ap. 118.

(e) *Burnell v. Brown*, 1 Jac. & W. 72.

(f) *Gibson v. Spurrier*, Pea. Ad. C. 50.

(g) *Seaman v. Vawdrey*, 16 Ves. 390; see *Ramsden v. Hirst*, 6 W. R. 249.

(h) *Fortablow v. Shirley*, 2 Sw. 223.

(i) See 15 & 16 Vict. c. 51, s. 27; but see sect. 48.

Rights of way or water (*k*) (if any) should be referred to; for although a mere non-disclosure of their existence might not, in general, avoid the contract (*l*), the Court would readily lay hold of anything in the particulars, &c., at all inconsistent with their existence, as a ground for relieving a purchaser.

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Rights of
way, or water.

So, if the vendor's interest be in any way determinable, the fact should appear; for when a redeemable annuity was offered for sale, simply as an annuity (*m*), and leasehold houses were sold, without any mention being made of a private Act of Parliament which gave a Company the right to purchase them (*n*), the sales were held invalid.

And any-
thing which
may deter-
mine vendor's
interest.

The vendor, however, is not bound to mention in the particulars any matter affecting the property, and of which the purchaser has notice: *e.g.*, on the sale of leaseholds, the fact that the covenants and restrictions in the lease are unusually stringent need not be stated; for the purchaser, having notice of the lease, should satisfy himself as to the contents before he buys (*o*): but in such a case a reasonable opportunity ought to be allowed the purchaser of examining the lease (*p*).

But not
matter of
which pur-
chaser has
notice; *e.g.*
stringent
covenants
on sale of
leaseholds:

So, on the sale of copyholds, the particulars need not refer to the fines or customs of the manor; these being generally incidental to copyhold tenure (*q*): nor need they refer to the fact that the minerals cannot be worked without the lord's consent (*r*), nor to the fact that timber cannot be cut without his consent.

Or fines or
customs on
sale of copy-
holds:

So, where, on the sale of freeholds, it distinctly appears

Or quit
rents, &c.,

(*k*) See *Shackleton v. Sutcliffe*, 1 De G. & Sma. 609.

(*l*) *Oldfield or Bowles v. Round*, 5 Ves. 508.

(*m*) *Coverley v. Burrell*, Sug. 27.

(*n*) *Ballard v. Way*, 1 M. & W. 520.

(*o*) *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394;

Paterson v. Long, 6 Beav. 590; *Lewis v. Bond*, 18 Beav. 85; but see *ante*, pp. 95, 96.

(*p*) *Brumfit v. Morton*, 3 Jur. N. S. 1198.

(*q*) See and consider *White v. Cud-*
don, 8 Cl. & F. 766.

(*r*) *Hayford v. Criddle*, 22 Beav. 480.

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on sale of
manorial
freeholds

Or statutory
local taxes :

Or notorious
local cus-
toms.

But no mis-
representation
allowable :
e.g., mis-
statement of
lease :

Or of dimen-
sions of prop-
erty :

Or as to re-
deemed land
tax :

by the particulars that, the land is held of a manor, the vendor need not, it is conceived, refer to the existence of quit rents or even heriots (s). At Law their non-disclosure has been treated as constituting a fatal objection (t), although in Equity they might, if small, be treated as matter for compensation (u). The fair and proper course, however, is to mention their existence. So, where land is sold as ~~fen~~ land, the particulars need not refer to embanking and drainage taxes, to which it is subject under a local but public Act of Parliament (x).

So, on the sale of lands within the mining districts, any reference to the rights of mining (y) under the local customs would, it is conceived, be unnecessary ; as their existence is matter of notoriety (z).

But the particulars must contain no misrepresentation, e.g., if, on the sale of leaseholds, the terms of the lease are misstated, the sale may be set aside ; even although the auctioneer read the lease at the sale (a).

So, where property thirty-three feet in depth was described as forty-six feet deep, the purchaser was allowed an abatement of the price, although he was the occupying tenant (b).

So, where redeemed land tax, consisting of several sums charged on distinct tenements, was described as an aggregate sum issuing out of all, the misdescription was held to be a fatal objection to the title (c).

(s) See *Damerell v. Protheroe*, 10 Q. B. 20, showing that heriots may be due in respect of freeholds ; *Lord Chichester v. Hall*, 17 L. T. 121, Q. B.

(t) *Turner v. Beaurain*, Sug. D. 512.

(u) *Vide* *infra*. Ch. XVIII.

(x) *Sturwood v. Archer*, 2 Sim. 485 ; affirmed, 3 Russ. and M. 751.

(y) As to, which see *Rogers v. Barton*, 12 Jur. 348 ; *Ross v. Bredon*, 3 Mann. & R. 347, 339, 341, 344.

(z) And see now, as to the Hundred of High Peak, Derbyshire, the 14 & 15 Vict. c. 94.

(a) *Flight v. Booth*, 1 Bing. N. C. 379 ; *Jones v. Edney*, 3 Camp. 285 ; and see *Yatt v. Corps*, 5 Myl. & K. 269 ; *Flight v. Barton*, 4b. 282.

(b) *King v. Wilson*, 4 Beav. 124 ; see *Whittington v. McGregor*, 20 L. T. 175.

(c) *Gos v. Gossett*, 8 Jur. N. S. 1142.

And the effect of what would otherwise be notice may be destroyed, not only by actual misdescription or misstatement, but by anything calculated to deceive, or even kill suspicion, upon the particular point; as where lot A. (building land) was expressed to be sold subject to the rights of way reserved by the existing leases of adjoining property B., and a plan, specially referred to in the particulars, disclosed a carriage-way reserved over A. to B., and also a way reserved over A. to another lot C., but gave no indication of another way reserved over A. to B., the particulars and plan were treated as deceptive; and the purchaser was held not bound, under the particular circumstances, to have inspected the leases (*d*).

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Not anything calculated to deceive, &c.

Reference to deceptive plan.

So, where a lessee sold, (by way of underlease,) part of a demised estate, and the particulars mentioned that the original lease contained a power of re-entry on breach of a covenant against certain trades being carried on upon the premises, and that the purchasers must enter into similar covenants, but did not state the fact—which is a serious defect in the title (*e*)—that some underleases, already granted of parts of the property, contained no such covenants, the purchaser recovered his deposit at Law (*f*). So, in Equity, a vendor of property in lease is not justified in parading upon his particulars the existence of covenants beneficial to the estate, but which he knows or has good reason to believe cannot be enforced (*g*): although he is not, as a general rule, bound to show who are *nominatim* the parties liable upon such covenants (*g*).

Or deceptive statement as to covenants.

Where a lease, which contains the usual covenant to deliver up the premises in good repair at the end of the term, is sold, and any of the demised buildings have been

On sale of lease, removal of buildings to be stated.

(*d*) *Dykes v. Blakie*, 4 Bing. N. C. 463; and see *Gibson v. D'Ester*, 2 Y. & C. C. C. 542; and see *Bealcomb v. Beckwith*, L. R. 8 Eq. 190.

(*e*) *Darlington v. Hamilton, Kay*, 550; *Bartlett v. Salmon*, 1 Jur. N. S. 278; see *S. C.* on appeal, 4 W. R. 32;

6 De G. M. & G. 33; reversing V.-C. Wood's decision.

(*f*) *Waring v. Hoggart, Ry. & M.* 39; and see *Davies v. Betts*, 12 Jur. 412, 709; and *Spunner v. Walsh*, 11 Ir. Eq. R. 597.

(*g*) *Flint v. Woodin*, 9 Ha. 618.

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Sale of part
of demised
property, or
of under-
lease.

removed, the fact should be stated: the omission of the buildings from the particulars is not sufficient (*h*). So, where other property is comprised in the lease (*i*), or the interest offered for sale is an underlease (*k*), the fact should appear in the particulars or conditions: and its omission may be considered a sufficient ground for refusing specific performance (*l*).

Discrepancy
between
particulars
and lease.

Where the particulars refer to the lease, and there is a discrepancy between the two, and the terms of the lease are the more favourable to the purchaser, the vendor is bound by the description in the lease, and must show a title in conformity therewith (*m*).

Puffing
statements.

As respects commendatory statements and descriptions in the particulars, which are separated from actual misdescription by a very narrow boundary, we may refer to the observations already made in Ch. III.: a fair and correct description will, in the average, be found to be as agreeable with sound policy as it is with morality.

Reference
to plan.

When a plan of the estate is attached to, or accompanies, the particulars, and is incorrect, it will be a material consideration with the Court of Equity whether the purchaser was thereby misled: but, if accurate, it is merely tantamount to a view of the property: so that when an estate was sold in lots, and it correctly appeared by the plan that lot 1, an *inn*, was supplied with water by a drain leading from a well in lot 4, this was held to be merely expressive of the physical fact, and not to amount to any engagement on the part of the vendor that there should be a reservation of a right to

(*h*) *Granger v. Worms*, 4 Camp. 88; see 3 Smith, 435.

(*i*) *Tombles v. White*, 3 Smith, 435; *Lesty v. Millar*, 2 De G. & Jo. 110, 122; *Brumfit v. Morton*, 3 Jur. N. S. 1198; which see as to "derivative lease" and "underlease" being convertible terms.

(*k*) *Maddy v. Booth*, 2 De G. & S.

718.

(*l*) *Brumfit v. Morton*, 3 Jur. N. S. 1198; Sug. 300. See, too, *Hayford v. Oridde*, 22 Beav. 477; where, however, the purchaser knew he was buying an underlease. See, too, *Darlington v. Hamilton*, Kay, 550; where the point was considered doubtful.

(*m*) *Bentley v. Craven*, 17 Beav. 204.

water in the conveyance of lot 4: and a bill filed by the purchaser of lot 1 for compensation, was dismissed with costs (n). But where the plan so represents adjoining land as to make it apparently part of the property, and the purchaser is thereby misled, this may be a ground for refusing a decree for specific performance against him (o). Thus, where an estate was sold in lots, subject to restrictive covenants as to the trades to be carried on upon the estate, and the vendor retained a small plot which, though shown on the plan, was not coloured, or marked with his name, as in the case of other adjoining owners, the Court refused to enforce the contract against a purchaser of one of the lots, unless the vendor entered into similar restrictive covenants as to the excepted plot (p).

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So, on the sale or lease of building ground, the exhibition, on the plan, of intended roads or other improvements on the adjacent land, does not bind the vendor or lessor to make or execute such roads or improvements (q), nor entitle the purchaser or lessee to a grant of right of way over any roads so laid down on the plan, except such as form the direct means of communication with the nearest highway (r); but a vendor would not, it appears, be allowed to divide and appropriate the land in a different manner, so as to attract an occupancy and population entirely different from that which would probably have been produced by acting on the plan proposed and held out at the sale (s). On the other hand, when a house is sold "with all its lights," a statement

To plan showing intended adjacent roads and improvements.

Statement that adjoining land is building land.

(n) *Fewster v. Turner*, 6 Jur. 144; and see *Dykes v. Blake*, 4 Bing. N. C. 463.

(o) See *Weston v. Bird*, 2 W. R. 145, V.-C. K.; *Denny v. Hancock*, L. R. 6 Ch. Ap. 1; and *supra*, p. 114.

(p) *Baskcomb v. Beckwith*, L. R. 8 Eq. 100.

(q) *Foote's of Heriot's Hospital v. Gibson*, 2 Dow. 301; *Squire v. Campbell*, 1 Myl. & C. 459; *Nurse v. Lord Seymour*, 13 Beav. 269; see *Schreiber v. Creed*, 10 Sim. 9; but see

also *Beaumont v. Duke*, Jac. 422; and see *Nicholson v. Rose*, 4 De G. & Jo. 10.

(r) *Randall v. Hall*, 4 De G. & S. 343; but *quære*, whether the vendor, refusing to grant a right of way, at any rate over such roads as might eventually be made, could enforce specific performance: See judgment.

(s) *Peacock v. Penson*, 11 Beav. 355; and, upon the construction of covenant to make roads see *Mason v. Cole*, 4 Exch. 375.

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in the particulars that adjoining land, belonging to the vendor, is building land, does not authorize the vendor, or a purchaser from him, to build upon the adjoining land, so as to obstruct such lights (a).

Vendor of house retaining adjoining land cannot obstruct lights.

We may here remark it to be well established that where a person owns a house, having the actual use and enjoyment of certain lights, and also holds the adjoining land, and sells the house, he cannot, although the lights be *new*, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights (v).

Reference to plans.

Care should be taken upon the sale of house property or building land which has been described in the title-deeds by reference to indorsed plans and a scale of measurement, to ascertain that the measurement is correct: a slight variation may lead to serious difficulty with a purchaser.

Meaning of particular expressions.

In the construction of particulars of sale, the Courts have attached the following meanings to the following expressions; viz:—

"Brick-built house;"

A house described as "brick-built" is understood to be brick-built in the ordinary sense of the words; not composed externally partly of brick and partly of timber and lath and plaster (x): but the description of a house as "substantial and convenient" is merely relative, and in one case, where a house was so described, the purchaser was held to his bargain, although one of the external walls was only half a brick in thickness (y).

"Clear yearly rent."

By "clear yearly rent," is understood a rent clear of all outgoing, &c., usually borne by the tenant; but subject to such (as land tax) as are borne by the landlord (z).

(a) *Swanborough v. Coventry*, 9 Bing. 305; but see and distinguish *Booth v. Clark*, L. R., 8 Ch. Ap. 667, and *vide supra* Ch. tit. sect. 4.

(v) Per Curiam, 9 Bing. 309; and see as to new windows, *Compton v. Richards*, 1 Fd. 27; and *Richards*

v. Bridges, 4 Ad. & E. 176; and see *Leatham's Law of Window Lights*, pp. 56 & seq.

(x) *Powell v. Dumble*, Sug. 29.

(y) *Johnson v. Stuart*, 2 Glt. 151 6 Ex. N. S. 215.

(z) 2 Ves. R. 500.

The expression "farm," includes woodland, part of the estate, although not in the occupation of the tenant (a).

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"Farm ;"

A house where beer was sold by retail under a licence "not to be drunk on the premises," has been held not to be a public house for the sale of beer (b).

"Public house ;"

The expression "free public house," is a misdescription when the lease contains a covenant to take beer from the lessor (c).

"Free public house ;"

By the expression "ground rent," if unexplained, is to be understood a rent less than the rack rent of the premises : its proper meaning is the rent at which land is let for the purpose of improvement by building (d) : but the expression is very carelessly used. Where what was called a ground rent was in fact a sum in gross, paid for the right of user of a pleasure ground, the purchaser was allowed to rescind his contract and recover his deposit (e).

"Ground rent."

On the sale of a manor, care should be taken to ascertain accurately what are its constituents. Minerals under teneemental freeholds, or under lands formerly copyhold of the manor but since enfranchised, an advowson, or allotments made to the lord upon inclosure of wastes, may form parcel of the manor without the fact being suspected : and would pass under the ordinary words of conveyance of the manor, unless specially excepted (f).

Precautions to be observed on sale of manor.

(a) *Portman v. Mill*, 2 Jur. 356.

(b) *Pease v. Coats*, L. R. 2 Eq. 688, *sed qu.* See *Fisken v. Slater*, L. R. 7 Eq. 523, and compare *Jones v. Bone*, L. R. 9 Eq. 674.

(c) *Jones v. Halsey*, 3 Camp. 285 ; *Modlen v. Snowball*, 29 Beav. 641 ; 7 Jur. N. S. 1260.

(d) *Stewart v. Alliston*, 1 Mon. 26 ; *Bartlett v. Salmon*, 1 Jur. N. S. 278 ;

reversed 6 De G. M. & G. 33 ; and see *Leroy v. Mogford*, 2 Jur. N. S. 1084.

(e) *Evans v. Robins*, 8 Jur. N. S. 816 ; and see *Lanford v. Selmes*, 3 Jur. N. S. 859 ; 3 K. & Jo. 220.

(f) See *Att.-Gen. v. Exelme Hospital*, 17 Beav. 366 ; *Hicks v. Sallitt*, 3 De G. M. & G. 782 ; *Hicks v. Hastings*, 3 K. & Jo. 701.

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Conditions
should be
printed.

(3). *As to the conditions.*

The conditions of sale should be printed and circulated some time previously to the sale, or at any rate in the auction room, so as to give each person an opportunity of ascertaining the terms on which the property is sold. The system which is adopted by some of the provincial Law Societies (g) of having printed common-form conditions which are used on every sale, and to which are prefixed the special conditions under which the particular property is sold, has much to recommend it; the effect of the common form conditions is well understood, and the attention of the purchaser and his solicitor is at once directed to the special restrictive conditions. The practice, which still prevails in some parts of the country, of having written conditions which are merely produced and read over, but not circulated in the auction room, cannot be too strongly reprobated; and, if the purchaser is thereby misled, or not fully informed, on a material point, may result in the rescission of the contract (h).

Against re-
tracting
biddings.
Whether or
not binding.

In the absence of stipulation, a bidder at an auction may, audibly, before the fall of the hammer, retract his bidding (i); a condition negating this right is almost always inserted, and is recommended by Lord *St. Leonards*, who nevertheless expresses his opinion that it cannot be enforced (k): such a condition, however, was held to bind a mortgagee's solicitor, who bid at the sale of the mortgaged property made by the Court with the mortgagee's concurrence (l).

For with-
drawing lots.

In some cases it may be desirable that the vendor should reserve to himself the option of withdrawing any lots from the sale, whether they shall have been offered to public com-

(g) The Law Societies of Birmingham and Liverpool adopt this practice.

(h) *Torrance v. Bolton*, L. R. 14 Eq. 121; L. R. 8 Ch. Ap. 118; and *vide* *supra* p. 115.

(i) *Payne v. Cave*, 3 T. R. 148; *Roulledge v. Grant*, 4 Bing. 652, 660.

(k) *Sug. 14*; referring to *Jones v. Nannery*, 13 Pri. 98.

(l) *Freer v. Rimmer*, 14 Em. 391.

petition or not, as, *e.g.*, in the case of a disputed bidding, or where there is not an adequate demand for the lots which are being brought into the market, or where, on the sale of a building estate, the lots which are first offered, and which from their position or other circumstances materially affect the value of the remaining lots, do not fetch the price put upon them, and are in consequence bought in.

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On sales by auction, where the property is offered for sale subject to a reserved price, this must be expressly stated; and if the vendor is desirous of reserving the right to bid, either by himself or his agent, this must be expressly provided for (*m*).

For reserved bidding.

On a sale by auction, it is usual to require payment of a deposit by the purchasers; and this may often be a prudent precaution on a sale by private contract: if the deposit will be of large amount, it may be well to provide for its investment, *e.g.* in Exchequer Bills or upon deposit with Bankers of repute, in order that there may be no loss of interest, nor liability in respect to the depreciation of securities.

Payment and investment of deposit.

It is also the ordinary practice to provide that the vendor shall, within a specified time, at his own expense, make and deliver to every purchaser an abstract of the title to the lot or lots purchased by him; but the vendor is, independently of any condition, bound to deliver an abstract; a delivery of the title-deeds is not sufficient (*n*); the condition, however, is useful as fixing the time for delivery. But if there is any doubt as to the vendor's ability to make out and deliver a sufficient abstract by the specified day, it is better to omit the condition: for if he fail to deliver the abstract within the period appointed, or if the abstract delivered be very imperfect, any condition binding the purchaser to make his objections within a specified time will fail of effect (*o*).

Delivery of abstract

(*m*) 30 & 31 Vict. c. 48, and *vide* *supra*, p. 118; *Gilliatt v. Gilliatt*, L. R. 9 Eq. 60; and *infra*, Ch. V., s. 5.

(*n*) *Sog.* 406; *Horne v. Wingfield*, 3 Sc. N. R. 340.

(*o*) *Southby v. Hutt*, 2 Myl. & C. 207; *Sherwin v. Shakspear*, 5 De G. M. & G. 517; *Upperton v. Nickolson*, L. R. 6 Ch. Ap. 436; and see *Dav. Conv.* 1, 456; which see as to conditions of sale generally.

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Restrictive
of pur-
chaser's
right to
abstract.

Where he
buys several
lots under
the same
title.

When the lots are small, and the title is voluminous, it may be well to stipulate, that no purchaser, whose aggregate purchase-money shall not amount to a specified sum, shall be entitled to an abstract, (or an abstract going back beyond a certain date,) except at his own expense: but in such case it may be prudent to state that a full abstract will be deposited with the vendor's solicitor, or elsewhere, for inspection by purchasers and their solicitors. Where a purchaser buys at the same auction several lots held under the same title, it seems to be the better opinion that he is entitled, in the absence of express stipulation to the contrary, to several abstracts. Whenever, therefore, property held under the same title is divided into lots, the conditions ought to provide that a purchaser of several lots shall be entitled to only a single abstract, except at his own expense. It may sometimes also be desirable to preclude a purchaser of several lots from requiring separate conveyances; which, as it is conceived, he may require, if not so precluded. Such a condition, however, is rare in practice.

"Abstract,"
means "per-
fect ab-
stract."

If any other condition refer to "the delivery of the abstract," this, in any question as to time, will be held to mean the delivery of a *perfect* abstract (*p*): i.e., an abstract as perfect as the vendor could furnish at the time of delivery (*q*); although it may be an abstract of a defective title (*r*); and if it contains, with sufficient fulness, the effect of every instrument which constitutes the title, it will be deemed sufficient to satisfy the condition; and time will begin to run against the purchaser as from the date of its delivery (*s*); and an abstract as delivered is presumed to be *perfect*, unless the contrary is shown (*t*).

Effect of non-
delivery of,
on conditions
as to time.

If the vendor fail to deliver a perfect abstract within the time specified, the purchaser is relieved from any condition binding him to object to the title within a given period after

(p) *Yobell v. Bell*, 2 Den. 17.

(q) *Montoy v. Cook*, 3 Hk. 111.

(r) *Blackburn v. Smith*, 3 Exch.
729.

(s) *Oakley v. Pitt*, 11 Jur. N. S.
604; *V.C.R.*

(t) *Ward v. ...*, 9 Jur. N. S.
1097.

delivery of the abstract (u); it is not unusual to guard against this rule, by providing, (in the condition as to objections,) that "an abstract shall, as regards any objection or requisition, be considered perfect, if it supply the information suggesting the same, although it may be otherwise defective" (x).

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It is usual, and proper, in every case, to specify the day on which the purchase is to be completed, and from which the purchaser is to have possession (y), or (if it be in lease) receipt of the rents and profits of the estate, and to pay interest (which may be reserved according to an ascending scale, (z) upon the purchase-money, if not then paid; and up to which day the vendor is to pay the outgoings. This condition, as to time, will not, however, in ordinary cases, be binding in Equity, unless time be declared to be of the essence of the contract (a). It is generally thought best to provide that the arrangement as to payment of interest and receipt of the profits, &c., shall hold, whatever may be the cause of delay in completion (b): and it was always considered that the purchaser must, under such a condition, pay interest during the time spent in clearing up the title (c): although, of course, it would not justify the vendor in wilful delay (d); but where the expression was, "if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser making default shall pay interest," &c., it was decided that the purchaser was exempted from payment of interest when the delay arose from the state of the title; inasmuch as he had made no default (e): in a modern case, at Law, where the agreement was that the purchaser should pay interest from

Condition
as to com-
pletion, and
interest.

Delay "from
any cause
whatever."

(u) *Blacklow v. Lowe*, 2 Ha. 40; *Southby v. Hutt*, 2 Myl. & C. 211.

(x) And see also *infra*, Ch. VIII.

(y) As to the meaning of "possession," *vide infra*, p. 129.

(z) *Herbert v. Salisbury and Yeovil R. Co.* L. R. 2 Eq. 221.

(a) *Vide infra*, Ch. X.

(b) "Completion" in such conditions means payment of the purchase

money; *Lewis v. South Wales R. Co.*, 10 Ha. 113.

(c) See *Greenwood v. Churchill*, 8 Beav. 413; *Esdaile v. Stephenson*, 1 Sim. & St. 129.

(d) *S. C.*; see the judgment in *De Visme v. De Visme*, 1 Mac. & G. 386.

(e) *Denning v. Henderson*, 1 De G. & S. 682; 12 Jur. 89.

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*De Visme v.
De Visme.*

How the
condition
should be
framed.

the day fixed for completion, if completion "should be delayed on his part," and the vendor and his trustee were ready to complete on the day named, but the purchaser was not prepared, and afterwards, when the purchaser was ready, the vendor's trustee refused to concur, it was held that interest was not payable after the latter date (*f*): in another case which has been much discussed (*g*), where the purchase was to be completed and the money paid on a certain day, "but if the purchaser should fail in making such payment, then, from whatever cause the delay might have arisen," interest was to be paid at five *per cent.*; and considerable delay arose in making out the title, it was held, either that the purchaser was not bound to pay interest until a good title was shown, or that, if bound by the condition to such payment, he was entitled to an equivalent compensation from the vendor: this doctrine, as we shall hereafter see, has been much broken down by later cases (*h*); and it may now be taken as well established, that the ordinary condition, whether with or without the words "from any cause whatever," will apply to every case except where the vendor, notwithstanding the purchaser's active remonstrances, is guilty of wilful default, or of such gross and persistent negligence as is tantamount to wilful default. In order, however, to avoid all possible question as to the scope and meaning of the condition, it may be prudent to frame it thus: "if from any cause whatever, other than the wilful and capricious refusal of the vendor to make out his title or to convey the estate, the purchase shall not be completed on the specified day, the purchaser shall thenceforth pay interest on so much of his purchase-money as for the time being shall remain unpaid, and shall have no claim to compensation in respect of the delay in completion."

"Receipt of
rents and
profits."

The common condition that a purchaser, "upon completion,

(*f*) *Perry v. Smith*, 1 Car. & M. 554.

(*g*) *De Visme v. De Visme*, 1 Mac. & G. 336; *vide infra*, Ch. XIII; see as to interest, *Rowley v. Adams*, 12 Beav. 478.

(*h*) See among others *Baughman*

v. Clark, 3 Drew. 362; *Vickers v. Hand*, 20 Beav. 380; *Lord Palmerston v. Turner*, 33 Beav. 524; *Williams v. Glenton*, 33 Beav. 523; L. R. 1 Ch. Ap. 200; and *vide infra*, Ch. XIII, s. 4, where the effect of this condition is more fully considered.

shall be let into the receipt of the rents and profits," *prima facie*, refers only to rents reserved on an ordinary tenancy; and where property was described as "now or late in the several occupations of H. R. and others," and parts of the property were subject to leases for lives at low rents, of which the purchaser had no notice, it was held that the ordinary condition as to letting him into receipt of the rents and profits did not apply, and that he could not be compelled to accept the title without a compensation (i).

The word "possession" is a flexible term, and does not "Possession." necessarily import a personal occupation. Thus, where the property, an orchard, was described "as in occupation of L. P.," and the purchaser was to have *possession* on the day fixed for completion, it was held that he could not insist on being put into personal occupation of the property (k).

We may here remark that an agreement that if the purchase-money were not paid at the time fixed for completion, the purchaser should pay "in lieu of interest upon the same a clear rent of *l. per annum*," was not, while the laws against usury (l) were in force, deemed usurious by reason of the rent exceeding the amount of interest at *5l. per cent.* on the purchase-money (m); nor will the Court now relieve against an agreement to pay interest on an increasing scale varying with the continuance of the delay in completion (n); but a bond for the purchase-money carrying interest at more than *5l. per cent.* was formerly usurious (o), unless protected by the 2 & 3 Vict. c. 37. We may also remark that the repeal of

Usury.

(i) *Hughes v. Jones*, 3 De G. F. & J. 307; 31 L. J. N. S. 83.

(k) *Lake v. Dean*, 28 Beav. 607.

(l) Repealed prospectively by 17 & 18 Vict. c. 90.

(m) *Spurrier v. Maggs*, 1 Ves. jun. 527; 3 C. 4 Bro. C. C. 38; and see *Dowling v. Leigh*, 3 J. & L. 716; *Dalcher v. Vardon*, 3 Coll. 162; and *Beste v. Bidgood*, 7 B. and C. 453, where the Court held that future payments reserved under the name of

interest, were in fact principal; and see notes to *S. C.*, 1 Mann & Ry. 143, 151; *Barry v. Neaham*, 3 C. B. 641, 654. See, however, as to usury, *Lane v. Horlock*, 1 Dre. 587; reversed, 2 Jur. N. S. 289; 5 H. L. Ca. 530; *James v. Rice*, Kay, 231; reversed on other grounds, 5 De G. M. and G. 461; *Thomas v. Cooper*, 18 Jur. 638.

(n) *Herbert v. Salisbury, &c., Co.*, 2, 1866, W. N. 190.

(o) *Dewar v. Spar*, 3 T. R. 425.

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the usury laws has not affected the jurisdiction of the Court to grant relief against unconscionable bargains (p).

Conveyances.

It is usual, on a sale by auction, to provide, that the vendor shall, upon payment of the purchase-money, execute proper conveyances to the respective purchasers of the lots purchased by them respectively; such conveyances, &c., to be prepared by and at the expense of the respective purchasers, and by them tendered for execution at a specified time and place. The condition is scarcely necessary; for the contract in itself gives the purchaser a right to a conveyance upon payment of his purchase-money; and he is, *primâ facie*, bound at his own expense to prepare and tender it (q). It may sometimes, where time is intended to be of the essence of the contract, be well to stipulate that, in accordance with the universal practice, a draft of the proposed conveyance shall, at a specified time before the day fixed for completion, be furnished for perusal by the vendor's solicitor.

Covenants by trustees and mortgagees.

So it is usual, and therefore perhaps expedient, on a sale by mortgagees or trustees, to stipulate that they shall be required to covenant only against incumbrances; but the condition seems to be unnecessary; and were it omitted, the purchaser, it is conceived, could generally neither insist upon any further covenants, nor refuse to complete upon the ground of the vendors declining to enter into them.

Apportionment of accruing rents.

So it is usual to stipulate that the rents will be received, and the outgoing discharged, by the vendor up to the day fixed for completion, and as from that date by the purchaser, and that if necessary an apportionment of such rents and outgoing shall be made between them.

Apportionment of rent-charge.

Where land subject to a rent-charge is sold in lots, and the owner of the rent is unable or unwilling to concur in an apportionment thereof under the provisions of the Inclosure

(p) *Tyler v. Tyler*, L. R., 6 Ch. Ap. 665; *Miller v. Cook*, L. R. 34 Eq.

(q) *Eng.* 240, 241; *Foots v. Hill*, 6 M. & W. 835.

Acts (r), or to release the land offered for sale under the 22 & 23 Vict. c. 35, it is usual to stipulate that each purchaser shall pay a specified portion of the rent-charge; and, if he desires it, shall procure an apportionment at his own expense. In such a case, the amount apportioned to each lot should be stated in the particular.

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If, where property is sold in lots, any part comprised in two or more lots be upon lease at one entire rent, or if all or any part of the property comprised in one lot, be let together with other property at one entire rent, and the consent of the tenant to an apportionment of the rent cannot be obtained prior to the sale, the conditions must provide for its apportionment (s); and, although perhaps not strictly necessary, where the intended apportionment of the rent is clearly specified (t), it may, by way of precaution, be well to stipulate that the concurrence of the tenant, who is not bound by an apportionment made without his consent, shall not be required (u).

Apportion-
ment of rent
on severance
service.

It may be well to remark here that where the reversion on a lease is severed, and the rent is legally apportioned, the assignee of each part has now, in respect of the apportioned rent allotted to him, the benefit of all conditions or powers of re-entry for non-payment, as if they had been reserved to him as incident to his part of the reversion in respect of such apportioned rent (x).

Apportion-
ment of rent
on severance
of reversion.

Where leasehold property held under one demise at an entire rent is offered for sale in lots, provision must be made for the apportionment among the several purchasers of the rent and liabilities under the lease. The lessor is seldom likely to concur in an arrangement, which, while it increases the trouble of collection, may lessen his security for the rent. There is no plan by which such an apportionment may be

Apportion-
ment of rent
and liabilities
on sale of
leaseholds in
lots.

(r) See 17 & 18 Vict. c. 97, ss. 10,
14.

(s) See *Barnwell v. Harris*, 1
Taunt. 430.

(t) *Waller v. Maunde*, 1 J. & W.
181.

(u) *Dav.* Vol. I., p. 473.

(x) 22 & 23 Vict. c. 35, s. 3.

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affected which is wholly free from objection. Sometimes cross powers of entry and distress are given to the several purchasers over the other lots; but where the lots are numerous this is a complicated process; and the most approved plan is to assign the lease to the largest purchaser in value, and to require him to grant derivative leases for the whole term, wanting one day, to the purchasers of the remaining lots at the apportioned rents.

Crops, &c.

Upon the sale of land used for agricultural purposes, it may be often necessary to insert a condition as to the growing crops being taken and paid for by the purchaser: or as to allowance being made for seed, manure, tillage, and such other things as, according to the local custom, are usually matters for allowance between an outgoing and an incoming tenant.

**Right to, if
no condition.**

If the property be in lease at the time of sale, the purchaser will, of course, be subject, in these respects, to the rights of the tenants: if, however, it be in hand, and nothing be said as to the crops, they will belong to him from the day fixed for completion; and it is conceived that the vendor will not be at liberty previously to remove them in an immature state: and of course, in the absence of stipulation, the vendor himself could make no claim in respect to seed, manure, tillage, &c.

Fixtures.

There should be a condition as to fixtures (y), if the purchaser is to pay for any. In the absence of any express stipulation, common fixtures (z), including such as are not strictly fixtures, will be held to be included in a contract for sale; and will pass by the conveyance, unless a contrary intention can be collected from the instrument (a).

(y) As to what are fixtures, vide *infra*, Ch. XII., s. 4.

(z) See, however, *Ex parte Quincy*, 1 Ark. 477.

(a) *Colegrave v. Das Santa*, 2 B. & C. 76; *Hill v. Walton*, 4 M. & W. 409. and cases cited. 411:

Manning v. Bailey, 2 Exch. 65; *Ex parte Lloyd*, 1 Mon. & A. 494; *Hare v. Horton*, 5 B. & Ad. 718; *Sag. 38*; *Wiltshire v. Dwyer*, 1 El. & Bl. 674; *Wether v. Dwyer*, 1 El. & Bl. 674; *Hutchinson v. Ray*, 29 Beav. 413; *Halse v. Hamilton's ex* 3 Tlo 13. P. &

Payment for timber by the purchaser, if intended, must be provided for by the conditions (b). The effect of the general condition has been held to be destroyed, as to lots A. and B., by a particular statement being appended to the descriptions of lots C. and D., that the timber on *them* was to be paid for (c).

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Timber.

The expression "timber," which means trees fit to be used in building and repairing houses (d), includes oak, elm, and ash, everywhere; and, by local custom, beech (e), and various other trees; even trees which are primarily fruit trees, as cherry, chesnut, and walnut (f); no wood, however, is timber until of twenty years' growth (g). As a general rule, pollards would seem not to be timber; if sound, however, they may be timber by local custom. A grant of "timber and timber-like trees" includes not only ordinary timber, and such trees, as by local custom, are considered timber, but even "thinnings," and the right of determining what are proper thinnings (h); so also it would seem to include sound pollards (i). An exception in a lease of "all timber and other trees, but not the annual fruit thereof," would seem not to include garden or orchard fruit trees, unless by local custom (k); the term "fruit" being considered to refer to the mast of timber trees.

As to what is
"timber."

Timber-like
trees.

Where, on the sale of intermixed freehold and copyhold land, it was provided, that the purchaser should not be entitled to have the quantities or boundaries of the two tenures distinguished, and he was to pay a specified sum

Timber must
be paid for
under condi-
tions, although
purchaser may
have no right
to fell it.

J. 587; *Boyd v. Shorrock*, L. R. 5 Eq. 72; *Turner v. Cameron*, L. R. 5 Q. B. 307, and *vide* *infra*, Ch. XII., sect. 4, where the law as to fixtures, and the operation of the Bills of Sales Act is more fully noticed.

(b) Sug. 32; see *Higginson v. Clowes*, 15 Ves. 516.

(c) *Higginson v. Clowes*, *ubi* *supra*.

(d) *Woodfall's Landl. and Ten.*, 456, 7th ed.

(e) *Aubrey v. Fisher*, 10 East. 446.

(f) *Duke of Chandos v. Tullot*, 2 P. Wms. 606.

(g) *Foster v. Leonard*, Cro. Eliz. 1. As to what are and what are not timber trees, see *Honywood v. Honywood*, L. R. 18 Eq. 306.

(h) *Gordon v. Woodford*, 27 Beav. 603.

(i) *Rabbit v. Raikes*, *Woodfall's Landl. & Ten.*, 457, 7th ed.; and see 2 P. Wms. 606.

(k) *Bullen v. Lanning*, 5 B. & C. 842.

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for the timber, this was held to bind him to the purchase without an abatement, although, the boundaries not being distinguishable, he could not fell a single tree. And in another case, arising under the same conditions, there was a like decision, although the entire lot was shown to be copyhold: the Court holding that the contract was entire, and that there was often much value and enjoyment in the possession of trees apart from their selling value as timber (*l*).

Misdescription.

It is a common condition, upon a sale by auction, and often upon a sale by private contract, that any misdescription, mistake, or error in the particulars, either way, shall not avoid the sale, but shall be the subject of compensation: and the condition usually proceeds to fix the mode in which the amount of compensation shall be settled.

What it extends to.

It has been held that such a condition must be taken to contemplate and provide for *only* such misdescription, mistake, or error, as, in the absence of the condition, would be a ground for avoiding the contract (*m*); but, notwithstanding the condition, the misstatement, if wilful or designed, as it amounts to fraud, will, even at Law, render the contract voidable at the option of the purchaser: and, if it arise simply from negligence, Equity will refuse a specific performance at the suit of the vendor, if the error be not a fair subject for compensation (*n*).

Misdescription on material point.

And where there has been a *bond fide* mistake in a matter essential to the contract, as where an estate was inadvertently stated to contain 21,750 acres, whereas it contained only half that quantity (*o*), the Court will refuse the purchaser's suit for specific performance, holding it not a case for compensation, but for avoiding the contract altogether. At

(*l*) *Cross v. Lawrence, and Cross v. Kaine*, 9 Ha. 442, 469; compare *Dawson v. Brinkman*, 3 Mac. & G. 53.

(*m*) *Leslie v. Thompson*, 9 Ha. 273; and see also consider *Hoy v. Smithies*, 22 Beav. 510.

(*n*) Sug. 23.

(*o*) *Earl of Durham v. Legard*, 34 Beav. 611; and see *Price v. North*, 2 Young & C. (Ex.) 620; and see and distinguish *Cordingley v. Chesborough*, 8 Jur. N. S. 585, 755.

Law, cases have occurred, in which the opinion was entertained that, however gross the negligence, the purchaser is bound, if there be no fraud (*p*); but this opinion has not been followed (*q*): and the rule at Law seems now to be as laid down by Tindal, C. J.; viz., "that where the misdescription, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such a case the contract is avoided altogether, and he is not bound to resort to the clause of compensation: under such a state of things he may be considered as not having purchased the thing which was really the subject of the sale" (*r*). So, in Equity, the reasonable rule is, that the contract is vitiated by a misrepresentation, "*dans locum contractui*," i. e., asserting a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer he would not have entered into it; or suppressing a fact, or not properly stating a fact (*s*), the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether (*t*).

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At Law.

In Equity.

And where a vendor, who has the means of knowledge, and is bound to use due diligence, misdescribes his property in any important particular, it seems probable that the facts would in themselves be deemed conclusive evidence of a fraudulent intention (*u*): e. g., a statement that the estate was about one mile from Horsham, when in fact it was upwards of three miles distant (*x*); and, in another case, a material misstatement, upon the sale of a house, as to the amount of the ground rent (*y*); and, in a later case, a description of dilapidated property, as "good and substantial but unfinished

Or caused by
gross negli-
gence.

(*p*) *Wright v. Wilson*, 1 Moo. & R. 307; and see *Mills v. Oddy*, 6 Car. and P. 728.

(*q*) Sug. 31.

(*r*) *Flight v. Booth*, 1 Bing. N. C. 370, 377; see 8 Cl. & F. 768.

(*s*) *Torrance v. Bolton*, L. R. 14 Eq. 124, L. R. 8 Ch. Ap. 118.

(*t*) *Pulford v. Richards*, 17 Beav. 96; *Swaisland v. Dearley*, 29 Beav. 430.

(*u*) See Sug. 23, & seq.

(*x*) *Duke of Norfolk v. Worsley*, 1 Camp. 387.

(*y*) *Mills v. Oddy*, 6 Car. & P. 728.

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buildings" (s), seem to have been considered, at Law, to be, in their very nature, fraudulent.

Purchaser
bound
although
misled by a
correct and
bona fide
description.

But a sale of property merely by its usual and known description, without alteration, addition, or comment, will bind the purchaser, although such description may in fact accidentally mislead him: for instance, where a house long known and rated as No. 39, Regency Square, Brighton, was sold in London by auction by that description, and the purchaser bought it without previous inquiry, and then found that it was not actually in the Square, but in a side street, commanding no sea view, and was a smaller house than the houses in the Square, he was held by Sir James Parker, V.-C., to his bargain (u).

Remarks on
White v.
Bradshaw.

In this case there was that degree of apparent hardship and mistake which might, without much difficulty, have induced the Court to decline to exercise its discretionary jurisdiction: but the decision, it is submitted, was correct. It was, no doubt, a hardship upon the purchaser to be obliged to take property of a less valuable kind than that which he fancied he was buying; but it might have been an equal or greater hardship on the vendor to throw the property back upon his hands, and so to deprive him of the advantage of those *bona fide* biddings at the auction, which immediately preceded the bidding upon which the house was knocked down to the purchaser. If a man chooses to enter a public sale room, and to bid for property without previous inquiry, and therefore evidently not with a view to personal occupation, but as a more speculative investment, relying on his own imperfect knowledge or recollection of its particular features, and then finds that he has made a mistake, all that can be said is, "*qui vult decipi, decipiat*." If, however, the advertisement or particulars had contained any reference

(s) *Robinson v. Murgrove*, 8 Car. & P. 400; *Loyd v. Newland*, Sug. 401; but, in general, a misstatement as to the state of repairs would seem

Equity; *Dyer v. Murgrove*, 10 Ves. 505, 506.

(u) *White v. Bradshaw*, V.-C. P., 15 Jan. 1855.

to Regency Square as possessing those peculiar advantages—such as a sea view—which, although enjoyed by the houses generally, were not enjoyed by No. 39 in particular, such reference, although strictly correct in fact, would probably have been held to savour sufficiently of deception to deprive the vendor of the assistance of a Court of Equity.

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Where a house known as No. 58, Pall Mall, but which in fact was built at the back of No. 57, and communicated with the street merely by a passage, was sold by auction, not merely as "No. 58, Pall Mall," but as "No. 58, on the north side of Pall Mall, opposite Marlborough House," the Court held the case to be one of misdescription, and not to fall within the authority of the Regency Square case (b): and the cases seem to be distinguishable on this ground, viz., that in the former there was a mere description of the property in those terms in which alone it could be properly described; whereas, in the latter, the ordinary description was so amplified, as apparently to involve an assertion by the vendor that the premises actually occupied a specified desirable locality.

Stanton v. Tattersall, distinguished.

If the intending purchaser do not rely upon the particulars or statements of the vendor, but examine the property in person or by his agents, he cannot, in the absence of direct fraud, contend that he is deceived by the representations of the vendor as to any point upon which he has thus tested their accuracy (c); but if the misrepresentation be of such a nature as not to be apparent on a personal inspection, and the purchaser relies upon it, the mere fact of his having examined the property does not necessarily make the contract binding upon him (d).

So if he test accuracy of particulars.

It may, however, be collected from the cases at Law and

Cases of material misdescription.

(b) *Stanton v. Tattersall*, 1 Sm. & G. 529.

(c) See *Attwood v. Small*, 6 Cl. & F. 232; see the judgment in *Clapham v. Shillito*, 7 Beav. 149; and

Jennings v. Broughton, 17 Beav. 234; 5 De. G. M. & G. 126.

(d) *Denny v. Hancock*, L. R. 6 Ch. Ap. 1.

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in Equity, that, independently of fraud, and on the mere ground of the materiality of the misdescription, the usual condition as to compensation will not avail in the following cases, viz. :—

Where
property is of
different
nature ;

1st. Where the property is not of the same description as it appears to be in the particulars ; as where long leasehold is described as freehold (e) ; or copyhold is described as freehold (f) : unless, by reason of the fine, &c., being fixed and nominal, and the right to minerals and timber being in the tenant, the customary tenure is in fact equivalent to freehold (g) ; or where land which was formerly copyhold and has been enfranchised under the Enfranchisement Acts but remains subject to the rights of the Lord in respect of minerals, is described as freehold (h) ; or where an underlease is sold as an original lease (i) ; or as where, upon the sale of an estate let at lease on a rack rent, such rent is described as a ground rent (k) ; or where the occupation rent is overstated, or so stated as to mislead (l) ; or what is described as a freehold ground rent is in fact only a sum in gross secured by personal covenant (m) ; or as where a house, composed externally partly of brick and partly of timber and lath and plaster, is described as a brick-built house (n).

or not
identical ;

2ndly. Where the property, as described, is not identical with that intended to be sold : as when a vendor, intending

(e) See and consider *Broene v. Fenton*, 14 Ves. 144.

(f) *Ayles v. Cox*, 16 Beav. 23 ; *Upperton v. Nickolson*, L. R. 6 Ch. Ap. 436 ; L. R. 10 Eq. 228, and *vide infra*. Ch. XVJII., s. 9.

(g) *Price v. Macaulay*, 2 De G. M. and G. 339 ; and in such cases the effect of the Copyhold Enfranchisement Act, and the provision as to the reservation of minerals, must now be considered.

(h) *Upperton v. Nickolson*, *ubi supra*.

(i) *Madeley v. Booth*, 2 De G. & S. 718 ; *Law v. Urtwin*, 16 Sim. 377 ; but see *Darlington v. Hamilton, Kay*, 550 ; *Bartlett v. Salmon*, 1 Jur. N. S. 278 ; reversed 6 De G. M. & G. 33 ; *Bramble v. Morton*, 3 Jur. N. S. 1198 ; and see, too, *Hayford v. Oriddle*, 22 Beav. 477.

(k) *Stewart v. Alliston*, 1 Mer. 26.

(l) *Dinmock v. Hallett*, L. R. 2 Ch. Ap. 21.

(m) *Evans v. Robinie*, 10 Jur. N. S. 473, Exch. Ch.

(n) *Powell v. Double*, Sug. 29.

to sell No. 2 in a street, described it as No. 4, the purchaser, although No. 2 was the same description of house as, and in better repair than, No. 4, recovered his deposit at law (o).

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3rdly. Where a material part of the property described has no existence, or cannot be found (p); or where no title can be shown to it; as when, upon the sale of a leasehold house and small yard adjoining, the yard was not included in the lease, but held from year to year at a separate rent (q).

or material
part of it is
wanting, or
has no title,

4thly. Where the misdescription is upon a point material to the due enjoyment of the property; as when, upon the sale of a lease of a house and shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas in fact several *other* trades were forbidden (r): so, also, where upon the sale of a piece of land described as "a first-rate building plot of ground," no notice was taken of a right of way passing over it (s), or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned (t): or where a reservoir and waterworks were described as yielding a specified yearly rent exclusively of the land and buildings, and it appeared that this rent consisted of water rents paid by the occupiers of houses separated from the reservoir by property over which the vendors had merely a right of waterway under a yearly licence (u): or where a manufactory in a town abounding in springs was described as "well supplied with water," when in fact there was only an artificial supply from

or its due
enjoyment is
materially
affected;

(o) *Leach v. Mullett*, 3 Car. & P. 115.

(p) *Robinson v. Musgrove*, 2 Moo. & R. 92.

(q) *Dobell v. Hutchinson*, 2 Ad. & E. 355.

(r) *Flight v. Booth*, 1 Bing. N. C. 370; see *Vignolles v. Bowen*, 12 Ir.

Eq. R. 194, 196.

(s) *Dykes v. Blake*, 4 Bing. N. C. 463; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

(t) *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

(u) *Priest v. Macaulay*, 2 De G. M. & G. 330.

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a. Waterworks Company upon payment of a heavy annual rate (x): or where property is described as "freehold," and it is in fact subject to undisclosed restrictive covenants (y).

Or where
serious mis-
description as
to quantity ;

5thly. Where the misdescription as to quantity is so serious that it is no longer a fit subject for compensation ; as where the estate was said to contain "14 acres more or less," and it was found to contain 27 acres (z) ; or where the acreage was given as 21,750 acres, when it was in fact only half that quantity (a) ; and there may be cases where from the use intended to be made of the property by the purchaser, or from other circumstances, even a trifling deficiency in quantity, may not be a fit subject for compensation.

or amount of
compensation
cannot be
estimated.

6thly. Where the misdescription is of such a nature that the amount of compensation cannot be estimated ; as where, on the sale of a reversion, expectant on the decease of A. in case he should have no children, his age was described as 66 instead of 64 (b) ; or as where, at the sale of a wood, the particulars erroneously stated that the average size of the timber approached 50 feet, the number of trees not being stated (c) ; or as where the particulars stated the premises to be in the joint occupation of A. and B. as *lessees*, when in fact A. was only assignee of the lease, and B. was a mere joint occupier (d) ; or as where the right to coal under the estate was shown to be in other parties, and no means existed of determining its value (e) ; or as where property was described as "now or late in the occupation of H. R. and others," and

(x) *Leyland v. Illingworth*, 6 Jur. N. S. 811 ; 2 De G. F. & Jo. 248.

(y) See *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159.

(z) *Price v. North*, 2 Young & C. 628.

(a) *Earl of Durham v. Legard*, 34 Beav. 611 ; but see *Cordingley v. Chamberlough*, 3 Jan. 21, S. 585, 755, stated *infra*.

(b) *Sherrwood v. Robins*, Moo. & M. 194 ; and see 3 Cl. & F. 792.

(c) *Lord Brooke v. Rounthwaite*, 5 Ha. 298.

(d) *Bidgway v. Gray*, 1 Mac. & G. 109 ; but see *Grisell v. Peto*, 2 Sm. & G. 29 ; *Bartholomew v. Gibson*, 1 De G. & J. 692.

(e) *Smithson v. Powell*, 20 L. T. 104.

it was in fact subject to leases for lives at low rents which were not disclosed (f).

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The condition as to compensation usually provides that the amount shall be settled by arbitration; and, frequently, that any dispute arising under the contract shall be similarly referred. It has been held that an action lies for breach of such a stipulation (g).

Action lies for breach of the condition.

And it may be observed, that where the vendors are trustees they are not justified in allowing compensation for their own errors, and a Court of Equity will refuse to act upon a clause to that effect in the conditions (h).

Whether trustee should use it.

Instead of the usual condition providing for compensation in the event of any omission or misdescription in the particular, a condition is frequently inserted that in such a case no compensation shall be allowed by the vendor. In one case, where land was described as containing 1a. 2r. 8p., and the vendor showed a title to only 3r. 24p., it was held that, under such a condition, the purchaser was bound to complete without compensation (i). So where, by an unintentional error, land was stated to contain 7,683 square yards, but in fact contained only 4,350 square yards, and the purchaser, notwithstanding the conditions, insisted on compensation, though the vendor offered to vacate the sale, specific performance was decreed at the suit of the purchaser, but upon payment of the whole of the purchase-money and costs (k). But such a condition, if relied on by a vendor seeking to enforce specific performance, can be held to apply only to trivial errors; and not to preclude a purchaser from the right to compensation for a material deficiency in the quantity

Condition that no compensation shall be allowed by the vendor.

Condition that no compensation shall be allowed either by vendor or purchaser.

(f) *Hughes v. Jones*, 3 De G. F. & Jo. 307.

(g) *Livingston v. Ralli*, 1 Jur. N. S. 594, Q. B.; 2 C. L. R. 1098.

(h) *White v. Cuddon*, 8 Cl. & F. 766; (but see *Hill v. Buckley*, 17 Ves.

394;) *Hobson v. Bell*, 2 Beav. 17.

(i) *Nicoll v. Chambers*, 11 C. B. 996; and see *Lethbridge v. Kirkman*, 2 Jur. N. S. 372.

(k) *Cordingley v. Chesselorough*, 8 Jur. N. S. 585, 755.

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stated, as where the property was stated to contain 753 square yards, but in fact contained only 573 square yards (*l*); or from avoiding the contract where the misdescription is of such a nature as not to be a fit subject for compensation.

As to deeds
and attested
copies.

In the absence of stipulation, a vendor is bound to produce, at his own expense, the originals of all deeds and other instruments necessary to verify the abstract (*m*); except copies of court roll, and such instruments as are upon record (*n*), or have been lost (*o*) or destroyed; as respects all which he may verify his abstract by secondary evidence (*p*): he must, however, as a general rule, in order to render copies admissible in evidence, prove the execution, and delivery of the originals (*q*); which, when deeds are lost and the witnesses are unknown, is often an insuperable difficulty. When the sale is completed, the purchaser, if he cannot have the original title deeds, is entitled to a covenant to produce them, and to attested copies of the originals (*r*): this right, however, does not seem to extend to old deeds not necessary to make a title (*s*); or to copies of court roll, or instruments on record, unless (as respects the covenant for production) they are in the vendor's possession or power (*t*); or to documents used merely as negative evidence (*u*); and now by the Vendor and Purchaser Act, 1874, in the completion of any contract of sale of land made after the 31st December, 1874, and subject to any stipulation to the contrary, the inability of the vendor to

What documents the purchaser is entitled to have covenanted to be produced.

(*l*) *Whitemore v. Whitemore*, L. R. 8 Eq. 603.

(*m*) *Berry v. Young*, 2 Esp. 640, n.; Sug. 447.

(*n*) *Cooper v. Emery*, 1 Ph. 388. It seems doubtful whether the rule extends to deeds enrolled merely for safe custody, and not under any statutory provision; see 9 Jarm. Conv. by Sweet, 16.

(*o*) *Harvey v. Phillips*, 2 Atk. 541; as to what is sufficient evidence of loss, see *Green v. Bailey*, 15 Sim. 842; *Fitzwiller Pexage*, 10 Cl. & F. 953; *Hart v. Hart*, 1 Ha. 1; *Stubbs v. Sargon*, 4 Beav. 90; *Richards v.*

Lewis, 11 C. B. 1035; *Reg. v. Saffron Hill*, 1 EL. & B. 93; *Abbott v. Geraghty*, 6 Ir. Jur. 49, L. C.

(*p*) See as to a recital being under the circumstances sufficient secondary evidence of the recited deed, *Moulton v. Edmonds*, 1 De G. F. & Jo. 246.

(*q*) *Bryant v. Bush*, 4 Russ. 1; see, however, as to this, *infra*, Ch. VIII.

(*r*) *Boughton v. Jewell*, 15 Ves. 176.

(*s*) *Dore v. Tucker*, 8 Ves. 466.

(*t*) *Vide infra*, Ch. XIII. a. 6.

(*u*) See *Cooper v. Emery*, cited in 1 Hayes on Conv. 578.

furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, is not to be an objection to title, in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents (x). A legal covenant is, of course, a covenant so framed as to run with the land at law; but it is by no means clear what is meant by an "equitable right to production," or how such a right can be enforced, except, perhaps, against a holder of the deeds who took them with notice of the liability to produce them. The Act does not contain any definition of the term "land;" and this rule cannot, it is conceived, extend to a contract for sale of an incorporeal hereditament.

Previously to the late Act, the attested copies and deed of covenant had to be prepared at the expense of the vendor (y): if he wished to exclude, or to derogate from, the purchaser's rights in the above respects, he must do so clearly and explicitly in the conditions: but in one case a condition that all attested copies, &c., which the purchaser might require, "for the purpose of examination with, or verifying or proving the abstract, should be sought for and procured at his expense," was held to preclude him from requiring on completion attested copies of the title deeds at the vendor's expense (z). At Law, a condition that the deeds of covenant shall be procured *by*, and at the expense of, the purchaser, was held to throw upon him the risk of being unable to obtain them, the vendors having procured production of the deeds for the purpose of verification (a). But now, in cases falling under the late Act, such covenants for production as the purchaser can and shall require are to be furnished at his expense; and the vendor is only to bear the expense of perusal and execution on behalf of and by himself,

At whose
expense to be
prepared.

(x) 37. & 38 Vict. c. 78, sect. 2. *
(y) *Boughton v. Jewell*, 15 Ves. 176.
(z) *Abbott v. Darnell*, 2 Jur. N. S.
631; and see *Strong v. Strong*, 4 Jur.
N. S. 943; *sed quare*.

* (a) *Gabriel v. Smith*, 16 Q. B. 847;
but see and compare *Osborne v. Har-
vey*, 7 Jur. 229, V. C. K. B.; *Cotton
v. Scudamore*, 1 K. & J. 321.

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and on behalf of and by necessary parties other than the purchaser (b). It will be observed that this rule does not provide how the expense of attested copies is to be borne; so that, in the absence of stipulation, the vendor, it is conceived, will still be liable to prepare and furnish them at his own cost. When property is sold in lots, it is almost the invariable practice to throw the expenses of attested copies upon the purchasers; and a solicitor would generally incur personal liability by omitting a condition to that effect: the condition, if so intended, should expressly provide for the expense of all attested copies, whether required for the verification of the abstract, or for any other purpose (c). Particular care to insert proper conditions as to deeds should be taken upon the sale of a part only of an estate in mortgage, when the purchase-money is not likely to pay off the incumbrance: a deposit of the deeds with some third party, for the joint benefit of the mortgagee and purchaser, will, if acquiesced in by the mortgagee, be the most eligible arrangement (d).

Provision as to deeds on sale of part of mortgaged estate.

Custody of deeds, on sale in lots.

On a sale in lots, it is generally requisite to provide for the ultimate custody of the deeds, which, in the absence of stipulation, go to the purchaser of the lot largest in value (e); or rather, it is conceived, to the purchaser whose aggregate purchase-money of land held under the same title amounts to the largest sum. If, however, there be any lot which may fairly be considered a principal lot, the purchaser of it is usually made to take them and covenant for their production: where the intention is that they shall belong to the purchaser whose purchase-money amounts to the largest sum, it may occasionally be well to provide for the contingency of the two largest purchasers buying to an equal amount. The expression "largest lot" in such a condition means the lot of largest superficial area (e). Under a condition giving the deeds to the purchaser of the "largest lot," he is of course entitled to them as against the purchaser

(b) 37 & 38 Vict. c. 78, sect. 2.

(c) See *Abbott v. Darnell*, 2 Jur. N. S. 631.

(d) Sug. 135.

(e) See *Griffiths v. El Richard*, 1 K. & J. 19.

of lots of a larger aggregate area (f). Such a condition fixes, by its acreage, though not by name, the lot which is to carry with it the right to the deeds. When the vendor retains any part of the estate to which the deeds relate, he is now, subject to any stipulation to the contrary in the contract, entitled to retain them (g).

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Every condition intended to relieve the vendor from his *prima facie* (h) liability to deduce a marketable title, and verify the abstract by proper evidence at his own expense, must be expressed in plain and unambiguous language (i).

Title and
evidence of
title.

For instance, a condition that he shall not be bound to produce any original deed or other document than those in his possession and set forth in the abstract, was held not to relieve him from his liability to verify the abstract; for *non constat* that, because he has only certain specified deeds in his possession, he cannot prove his title (k). But where a contract provided that the purchaser should admit the vendor's heirship to the last owner upon a copy of his pedigree, and should not require any further evidence, the purchaser was forced to accept the title, although the copy of the pedigree failed to trace the heirship (l).

Production of
deeds.

Must verify
abstract
alimede.

So on an agreement by a vendor to sell a lease "as he held the same" for twenty-eight years, a condition that the pur-

Against pro-
duction of
lessor's title.

(f) *Scott v. Jackman*, 21 Beav. 110, following a decision of Lord Eldon in *Kennaird v. Christie*, *ib.* 111; and *vide infra*, Ch. XXI., sect. 5.

(g) 37 & 38 Vict., c. 78, and *vide infra*, Ch. XIII., sect. 7.

(h) *Souter v. Drake*, 5 B. & Ad. 692; *Doe v. Stanion*, 1 M. & W. 695, 701; *Hall v. Betty*, 4 Mann. & G. 410; *Worthington v. Warrington*, 5 C. B. 636; *aliter*, as regards goods, *Morley v. Attenborough*, 3 Exch. 500, see 514; but see *Simms v. Marryat*, 17 Q. B. 281. The nature of the subject-matter of the contract may vary the rule, as on an agreement to

buy the benefit of a proposal for a lease, *Baxter v. Conolly*, 1 Jac. & W. 576; and see as to restrictive conditions, *Lethbridge v. Kirkman*, 2 Jur. N. S. 372; *Stronge v. Hawkes*, *ib.* 388; *Phillips v. Caldecleugh*, L. R. 4 Q. B. 159.

(i) *Osborne v. Harvey*, 7 Jur. 229, V.-C. K. B.; and see *Clarke v. Fauz*, 3 Russ. 320; and *Morris v. Kearsley*, 2 Y. & C. 139.

(k) *Southby v. Hutt*, 2 Myl. & C. 207; and see *Dick v. Donald*, 1 Bl. N. S. 655; *Osborne v. Harvey*, *supra*.

(l) *Nash v. Browne*, 9 Jur. N. S. 431, V.-C. Stuart: *see quare*.

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On sale of an
 underlease ;

chaser should not require the lessor's title, would not, it appears, prevent the latter from showing that the lease was invalid (m). So on a sale of an underlease, a condition that "no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease," was held not to preclude the purchaser from objecting that the lessor, having mortgaged the premises, had no power to grant the underlease (n).

Where simply
 described as a
 lease.

So, upon a sale of an underlease, described simply as a lease, a stipulation that the vendor should not be called upon to prove his title, was held to be inoperative when it appeared that the original lease comprised other premises, and contained covenants embracing both properties and exposing the purchaser to eviction through the default of the holder of such other premises (o). And where the interest, being an underlease, was offered for sale without intimation of the fact, the defect was held fatal, although there was a condition that the purchaser should not call for the lessor's title (p); but this doctrine has been impugned in later cases (q).

So where leaseholds were stated to be sold "by order of the executors," but were in fact sold by the administrator *de bonis non* of the testator *durante absentia* of his next of kin, it was held that the title could not be forced upon the purchaser (r).

(m) See Sug. 359, and see judgment in *Shepherd v. Keatley*, 1 Cro. M. & R. 127, 128, disapproving of *Spratt v. Jeffery*, 5 Man. & R. 183; and see *Wheeler v. Wright*, 7 M. & W. 359, 362; but see 2 Coll. 341; and *Hume v. Bentley*, 5 De G. & S. 525; see *Musgrave v. McCullagh*, 11 Ir. Ch. Rep. 496; *Hume v. Pocock*, L. R. 1 Eq. 423; L. R. 1 Ch. Ap. 379.

(n) *Waddell v. Wolfe*, L. R. 9 Q. B. 515, and *vide infra*, p. 150; and V. & P. Act, 1874, 37 & 38 Vict. c. 78, sect. 2.

(o) *Blake v. Phin*, 3 C. B. 976;

see *Fildes v. Hooker*, 3 Madd. 193; *Darlington v. Hamilton, Kay*, 517.

(p) *Madeley v. Booth*, 2 De G. & S. 718; see also *Drumft v. Morton*, 3 Jur. N. S. 1198.

(q) See *Darlington v. Hamilton, Kay*, 557; *Bartlett v. Salmon*, 1 Jur. N. S. 277, V.-C. W., reversed, 6 De G. & G. 33.

(r) *Webb v. Kirby*, 7 De G. M. & G. 376, overruling V.-C. S., 3 Sma. & G. 333; and see too *Cruse v. Nowell*, 2 Jur. N. S. 536, where the condition did not point directly to the objection.

So where the conditions stated that the property was settled on A. for life, with remainder to her children, with a trust for sale on her death, and that, the sale being in her lifetime, the children, their assigns or trustees, should join in the conveyance, and it appeared that the children had settled their shares, and their trustees had no power to concur, the purchaser recovered his deposit (s): and an express agreement to make a good title has, at Law, been held to bind the vendor to remove defects in title, which were known to both parties at the date of the contract, and which were in their nature removable (t).

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For concurrence of parties who prove to be incompetent.

In the absence of express stipulation, the common condition, as to recitals being evidence, would not, it is conceived, bind the purchaser to accept recitals as evidence of conclusions of law (u): nor would it seem to preclude the purchaser from proving *aliunde* the inaccuracy of the recitals as to matters of fact. Whether this would be precluded even by the expression "conclusive evidence," may be doubtful; at any rate such a condition would not avail, if it contained any misrepresentation upon the point in question (x).

As to recitals being evidence.

The conditions usually provide that deeds more than twenty years old shall be conclusive evidence of everything stated, noticed, assumed, or implied therein. Where the condition was that they should be evidence of everything recited or stated, it was held that, in order to bind a purchaser, the statement ought to be something alleged by way of direct recital, and not mere matter of inference (y). Of course such a condition would not be sufficient to make sub-recitals evidence. And now, in the completion of any contract of the sale of *land*, made after the 31st December, 1874, and subject to any stipulation to the contrary in the contract, recitals, statements,

As to deeds twenty years old being evidence.

(s) *Moseley v. Hide*, 17 Q. B. 91.

(t) *Barnett v. Wheeler*, 7 M. & W.

364.

(u) 9 Jarm. Conv. by S. 4; *Goold v. White, Kay*, 683.

(x) *Drysdale v. Mace*, 5 De G. M. & G. 103.

(y) *Buchanan v. Poppleton*, 4 Com. Ben. N. S. 40; 4 Jur. N. S. 414.

Condition IV. and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, are, unless and except so far as they shall be proved to be inaccurate, to be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (a); but this rule, which does not bind the purchaser to accept mere matters of inference, is less comprehensive than, and in practice is not likely to supersede, the ordinary condition.

As to statutory declarations being accepted as evidence.

Where the evidence of some fact on which the title depends is insufficient, and there are no better means of verification, it is frequently provided that the purchaser shall be satisfied with a statutory declaration confirmatory of the title in the point in which it is defective. If such declaration has been actually made, it should be referred to and identified as a subsisting instrument. If it has yet to be made, its proposed effect should be clearly stated; or, which is better, a copy should be referred to: and, if practicable, the proposed declarant should be specified; a clause being added, providing for the substitution of some other competent person in the event of the death, refusal, or incapacity of the person so specified: and there should be no question as to the competency of the declarant to speak to the facts which he alleges (b). Where, as frequently happens, the declarant states what he cannot possibly know except by hearsay, his declaration is of small value as evidence.

Vendor bound to answer relevant questions.

And the author conceives it to be a general rule, and it is one which he has constantly enforced in practice, that a vendor, to the best of his information, is bound to answer all relevant questions put to him in respect to the property which he has contracted to sell, or the title thereto; unless the *prima facie* liability in this respect is expressly negatived by the conditions: and that a condition that a pur-

(a) 27 & 28 Vict. c. 78, sect. 2.

(b) See as to this, *Forbes v. Alcock*,

21 Beav. 207.

chaser shall be satisfied with certain specified evidence merely provides for an assumed absence of better evidence ; and does not enable the vendor to keep back such better evidence if he actually has it, or to withhold any information which may be in his possession.

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The following point often arises in practice. A large estate in the same locality has been acquired from time to time, and is held under a variety of early titles. Upwards of twenty years ago the whole was put into settlement, and has been since held under such settlement. It is now put up for sale in numerous lots, and it is impossible to identify the modern with the ancient general descriptions. The vendors accordingly sell under a mere condition that evidence of twenty years' possession shall be evidence of identity of parcels. The vendors' solicitor then, almost at random, as respects each particular lot, selects from the early titles such a title as he considers to be appropriate ; and supplements it by the general settlement, and the subsequent assurances (if any). The purchaser calls for evidence of identity, and is offered a declaration of twenty years' possession. Now such a declaration, referring as it does merely to a possession subsequent to the union of the titles, obviously cannot show, or tend to show, that the lot is held under one rather than another of those several prior titles, the assurances in which are expressed in terms capable of comprising such lot. The declaration and condition can, it is submitted, only bind the purchaser to assume that the lot passed under some one or more of the several possibly relevant prior titles ; and as the vendor cannot show which in particular is the true prior title, it may be well contended that he is bound to abstract *all*. Such a liability might in many cases be very serious ; and should, where circumstances require it, be guarded against by a condition more stringent than the one in ordinary use. It must also be borne in mind that in a case such as is above supposed, the doubt as to under which of several titles a particular lot is held, affects it with the aggregate imperfections of all such prior titles.

As to declaration of possession in proof of identity of lands held under several titles.

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Conditions, if
explicit will
bind pur-
chaser.

But though mere general or doubtful expressions, suggesting, but not specifying, a flaw in the vendor's title, may not bind the purchaser (c), he is bound by a clear (d) stipulation as to title (e), e. g., an agreement by assignees of a bankrupt to sell his estate "under such title as he recently held the same, an abstract of which may be seen" (f); or that the purchaser should only have the receipt and conveyance of A. (an equitable mortgagee), and the assignees (g); an agreement by ordinary vendors to convey "such title as they have received from A. and B." (h); and a condition that the purchaser should accept the vendor's title "without dispute" (i); or should accept "such title as the vendor has" (k): so, an agreement that the lessor's title shall "not be inquired into," has been held to preclude objections arising on the face of documents procured by the purchaser *aliunde* (l); so, where a breach of trust, invalidating the title, was clearly stated in the conditions (m); so where a purchaser was precluded from objecting that no payment had been made for twenty

(c) See *Edwards v. Wickwar*, L. R. 1 Eq. 68.

(d) *Seaton v. Mapp*, 2 Coll. 556, 562; *Forster v. Hoogart*, 15 Q. B. 155; *Worthington v. Warrington* 5 C. B. 636; *Lethbridge v. Kirkman*, 2 Jur. N. S. 372.

(e) But see *Darlington v. Hamilton*, Kay, 558; *infra*, n. (l), *sed qu.*

(f) *Freme v. Wright*, 4 Madd. 364.

(g) *Groom v. Booth*, 1 Dre. 548.

(h) *Wilnot v. Wilkinson*, 6 B. & C. 506; *Ashworth v. Mounsey*, 9 Exch. 175.

(i) *Duke v. Barnett*, 2 Coll. 337; and *Molloy v. Sterne*, 1 Dru. & Wal. 585, agreement by A. to lease for "the longest term he could grant;" and see *Anderson v. Higgins*, 1 J. & L. 718; and Lord St. Leonards' remarks, V. & P. 374, on *Cattell v. Corvill*, 3 Y. & C. 418; and see *Corvill v. Cattell*, 4 M. & W. 734; but see also *Smith v. Ellis*, 14 Jur. 682.

(k) *Keyes v. Heydon*, 20 L. T. 244, V.-C. W.; *Swain v. Mills*, L. R. 1 C. P. 39.

(l) *Hume v. Bentley*, 5 De. G. & S. 520; see, however, *Darlington v. Hamilton*, Kay, 550; but there, the stipulation in the condition did not preclude "inquiry" in other quarters; it was merely directed against requisitions on the vendor to prove the title. And see comments on *Hume v. Bentley*, and *Darlington v. Hamilton* in *Waddell v. Wolfe*, L. R. 9 Q. B. 515, where the word "inquiry" was treated as convertible with "requisition," and the condition was held not to preclude inquiry *aliunde*. The doctrine laid down in the second paragraph of the judgment in *Darlington v. Hamilton* that whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection, appears to be too broadly stated.

(m) *Nicholls v. Corbett*, 3 De G. J. & S. 18.

years of a rent the subject of sale (n); so, a condition binding a purchaser, if he considered the legal estate outstanding, to be at the expense of getting it in, was held to throw on him the risk of making out in whom the legal estate was vested (o). And, as a general rule, if facts are fully disclosed, their legal effect need not be stated (p).

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Even the special circumstances of the contract, independently of express stipulation, may show that no title was intended to be produced or called for (q); and in considering whether an objection to the title is sufficiently brought before the purchaser's notice by the conditions of sale, the fact of his being an able and experienced member of the legal profession is not immaterial (r).

Right to call
for title may
be excluded
by special
circumstances.

Where a vendor of leaseholds agreed to produce a good and marketable title, commencing from the freeholder, but no title was to be called for prior to the lease from A. B. to the vendor, and it appeared that the agreement for this lease had been mortgaged, and otherwise dealt with, it was held that the vendor, as plaintiff, could not refuse to produce this equitable title (s). And it has been held that, if instead of simply stating the material facts, and then stipulating that the purchaser shall accept such title and interest as the detailed circumstances confer on the vendor, and no other,—in which case the purchaser would probably be bound to take the title, whatever it might be—the conditions go on to state, not as a conclusion of Law from the narrated circumstances but as a positive and distinct fact, that the vendor has a right to sell the property, the purchaser, inasmuch as such right may have arisen from separate and independent sources, is entitled to require the right to be proved (t).

Condition
when not
conclusive.

(n) *Hanks v. Pulling*, 2 Jur. N. S. 15 Beav. 46.

372.

(o) *Off. Man. of Shoerness W. W.*

Co. v. Polson, 3 De G. F. & Jo. 36.

(p) *Smith v. Watts*, 4 Drew. 338.

(q) See *Richardson v. Eyton*, 2 De G. M. & G. 79, 88; *Godson v. Turner*,

15 Beav. 46.
(r) See *Minet v. Leman*, 20 Beav 269; 7 De G. M. & G. 840.

(s) *Rhodes v. Ibbatson*, 4 De G. M. & G. 787.

(t) See *Johnson v. Smiley*, 17 Beav. 233.

Case 17.
That abstract
shall com-
mence with
specified docu-
ment.

A condition that the abstract shall commence with a specified document, the peculiarities or deficiencies of which as a root of title are not noticed, seems merely to preclude the purchaser from objecting to the title as commencing at too recent a period; so that if the instrument in question is apparently an imperfect root of title, he may require the imperfection to be remedied: so, a mere condition against production of the earlier title would not, it is conceived, preclude him from requiring the production of recited instruments which, as recited, appear to be of a suspicious character (*u*); nor will the deduction of a sixty (or now forty) years' title on the face of the abstract preclude him, in the absence of an express stipulation, from requiring an inspection of title deeds in the vendor's possession of an earlier date than those abstracted (*x*). So, an agreement to accept a possessory title merely points to the evidence by which it is to be supported, and the vendor is still bound to prove sixty (or now forty) years' possession (*y*).

Does not
preclude
objections.

Nor will a mere condition against production, except perhaps in a very special case (*z*), prevent a purchaser from investigating and objecting to the earlier title, if he have the collateral means of doing so (*u*): and, although bound to accept the title as it stands, he may yet require to be satisfied, to the best of the vendor's ability, as to what that title really is (*b*). So, although a purchaser be bound by the condition to accept certain specified evidence as sufficient proof of a material fact, he may yet require to be satisfied that the vendor has no better evidence in his possession; and may, it would seem, insist on a statutory declaration to that effect (*c*). In one case where A., for his own purposes, in-

(*u*) See and consider *Sellick v. Trevor*, 11 M. & W. 722; *Philips v. Caldwell*, L. R., 4 Q. B. 159.

(*x*) *Parr v. Lovegrove*, 4 Drew. 170, 180; but see the special circumstances in this case.

(*y*) *Douglas v. L. N. W. R. Co.*, 3 K. & J. 173.

(*z*) *Burns v. Pritchard*, 11 R. & Ch. Ap.

(*a*) *Shepherd v. Kestley*, 1 Cro. & R. 117. See observations in this case in *Hampton v. Hamilton, Kay*, 553, and *Waddell v. Waddell*, L. R. 9 Q. B. 515.

(*b*) See *Kyng v. Kyng*, 20 L. T. 244, V.-C. W.; *Wright v. Kearsley*, 1 Y. & C. 153.

(*c*) *Bird v. Bird*, 11 Ha. 43.

duced B. to buy from C., and shortly afterwards agreed to purchase from B., who was only to produce the title from C. to himself, A. was not allowed to prove *aliunde* that C. had no title (d).

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If, therefore, the earlier title be merely wanting, the condition should provide for the abstract commencing with a specified document (the nature and effect of which should be stated, if it be of such a kind as not to form a satisfactory root of title); and the purchaser should be precluded from requiring the production of the earlier title, or of any earlier documents which may be recited or noticed in the abstracted title: if the earlier title be defective, or if the recited missing instruments are of a suspicious character, the condition should be extended, so as to preclude him from requiring, investigating, or making any objection to the earlier title, or any document prior to the commencement of the abstract, although subsequently recited or referred to.

How to be framed when early title lost or defective.

And in some cases it may be prudent, in using very special conditions, to state, that an abstract may be inspected before the sale.

Production of abstract before sale sometimes advisable.

Where conditions provide that the opinion of Mr. A. B., an eminent counsel, in favour of a point in the title, shall be conclusive on the purchaser, the vendor is not, it is conceived, at liberty to suppress the fact that Mr. C. D., a counsel of, it may be, much less eminence, has given a different opinion.

As to opinion of counsel being binding.

It is often requisite to insert conditions providing for defects in evidence of the identity of the parcels; such conditions, however, will not relieve the vendor from the necessity of pointing out what the entire property is which he intends to convey; nor (unless expressly framed to meet the case), will they do more than provide for mere deficiencies

Identity of parcels.

(d) *Hume v Pecoek*, L. R. 1 Ch. the special circumstances.
Ap. 379; L. R. 1 Eq. 423; but see

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in evidence; that is, they will not provide for *repugnances*, nor for an entire *absence* of evidence (e).

When part of
property
cannot be
found;

For instance, a condition that a certain plot of land could not be properly identified by the vendor, but it being fairly presumed that the purchaser, by inquiry in the neighbourhood, would be able to ascertain its true situation, he was to accept the plot by the description only contained in the conveyance deed of it, was held inoperative, even at Law, when it appeared that the plot did not exist or could not be discovered (f).

or cannot be
identified;

So, a condition that "the purchaser is not to require any further proof of the identity of the property than is furnished by the title deeds themselves," is insufficient in the absence of proof of identity as to the whole or part of the property (g). It is in effect a contract that the deeds shall show identity; and if they do not, a good title is not made (h).

or descriptions
are inconsis-
tent.

So a condition that no further evidence of identity of the parcels should be required than what was afforded by the deeds, instruments, and other documents abstracted, did not preclude a requisition for further evidence when the descriptions of the parcels in the abstracted documents varied from those in the particulars and from each other (i).

On sale of
lands of
different
tenures.

Upon a sale of intermixed lands of different tenures, under the common condition as to identity, the purchaser seems to be still entitled (k) to have the land of each particular tenure pointed out and distinguished by its boundaries (l).

But where an estate was sold as containing 1a. 2r. 8p., and the conditions provided that the quantities should be taken as stated, whether more or less, "although the title deeds or

(e) *Curling v. Austin*, 2 Dr. & Sm. 129, s. 2.

(f) *Robinson v. Maygrove*, 2 Moo. & R. 92.

(g) *Curling v. Austin*, *ubi supra*.

(h) V.-C. K. in *Curling v. Austin*.

(i) *Flower v. Hartopp*, 6 Barn. 454.

(k) *Monro v. Taylor*, 3 Ha. 51.

(l) See *Danson v. Brinckman*, 3 Mac. & G. 53; 3 De G. & S. 385; and *Cross v. Lawrence*, 9 Ha. 462; *supra*, 149.

Court Rolls state such quantities to be less," and that no evidence of identity should be required; the purchaser was held bound, although the abstract showed a title to only 3r. 24p. (m). So, in Equity, where the purchaser instead of vacating the contract, insisted on its specific performance, he was held bound to take, without abatement from his purchase-money, an estate described as containing 7,683, but in fact containing only 4,350, square yards (n).

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In the case of copyholds, the generality and vagueness of the descriptions on the Court Rolls are unimportant, if the vendor can show that the property has been actually held under such descriptions (o).

Vague
descriptions
of copyholds
sufficient.

The Courts, it may be remarked, look with jealousy on conditions negating a purchaser's right to a substantially good title, or to the usual and reasonable evidences of title: it has in fact been observed by an eminent Judge (p), that in some cases it would be almost a fraud for a vendor to bring a title to market with a condition that the purchaser should accept it. At any rate, such conditions should not be used to a greater extent than is necessary, as their tendency is to damp the sale; and this not so much by diminishing the biddings of parties who actually attend, as by keeping away others who are alive to their objectionable character. The prejudicial effect of even the most stringent conditions is, however, practically far less than might be reasonably anticipated.

Stringent
conditions
not favoured
by Court.

And it may be observed, that, on a sale in lots, the vendor should either verify the abstract at his own expense, or the expense of verification should be divided among the purchasers in some specified proportion; otherwise the pur-

Abstract on
sale in lots,
should be
verified at
vendor's
expense.

(m) *Nicoll v. Chambers*, 11 C.B. 996.

(n) *Cordingley v. Cheesborough*, 8 Jur. N.S. 585, 755; 31 L. J. Ch. 617; and see *Lethbridge v. Kirkman*, 2 Jur. N.S. 373; and *vide supra*, p. 141.

(o) *Long v. Collier*, 4 Russ. 267.

(p) Sir James Parker, in *Hume v.*

Bentley, 5 De G. & S. 527; See too *Jackson v. Whitehead*, 28 Beav. 154; *Smith v. Harrison*, 5 W. R. 408; *Warde v. Dickson*, 5 Jur. N.S. 698; *Edwards v. Wickwar*, L. R. 1 Eq. 68; See too *Hoy v. Smithies*, 2 Jur. N.S. 1011.

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Search.

buyer who first calls for evidence may be at the sole cost of procuring it.

**Expense of
searches, &c.**

There must be express conditions where the vendor intends to throw upon the purchaser the expense of such searches as are usually made by the vendor, of travelling to a distance to examine the abstract with the deeds, or the like (g): and a condition that the purchaser shall have a proper conveyance at his own expense, does not throw upon him the expense of procuring the concurrence of necessary parties (r).

**of getting in
outstanding
term.**

It is also usual to provide that the purchaser shall be at the expense of getting in and procuring the surrender or release of any outstanding legal estate or term; but such a condition does not extend to a mortgage term which is on foot at the time of sale, even though provision may have been made for satisfying the mortgage (s).

**Condition
that the
property shall
be taken
subject to all
easements, &c.**

A condition is usually inserted that the property shall be taken subject to all rents, rights of way and water, and other easements (if any) charged or subsisting thereon; the effect of such a condition is not, it is conceived, to relieve the vendor from the necessity of disclosing these liabilities, if he is aware of them, but simply to protect him, if it should afterwards transpire that the property is subject to some rent, right, or easement, in favour of a third person, of which he was ignorant at the time of sale; and where one tenant has acquired a right of way against another tenant, under the same landlord, and both tenements are simultaneously sold by the landlord under a condition that they are to be taken subject to, and with the benefit of, all subsisting rights of way, the purchaser of the one tenement gains no right of way against the purchaser of the other (t); the meaning of

(g) See Sug. 34, where the proposition as to searches is unqualified.

(r) *Parsons v. Greenleaf*, 1 Sm. & G. 541.

(s) *Strong v. Hudson*, 2 Jur. N. S.

333; vide *supra*, p. 135.

(t) *Daniel v. Johnson*, 8 Jur. N. S. 325; and see *Wright v. Brown*, 38 L. J. Ch. 343; *Wright v. Harford*, L. R. 2 Eq. 507.

the condition being that, if there are any rights of way as against the vendor, the purchaser shall take subject to them.

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If the estate be subject to incumbrances which cannot or are not intended to be discharged, they must be mentioned in the particulars or conditions (*u*). It often happens that property is subject to charges which, from particular circumstances, (such as there being other ample security,) are never likely to be enforced, although they cannot be immediately released: in such cases it is advisable to state the facts as clearly and openly as possible, and stipulate that the purchaser shall make no objection in respect of the matters so mentioned: if, as may often be the case, an indemnity be offered, its nature shall be explicitly stated (*x*). A condition that a purchaser should presume the extinction of a charge upon the ground of its non-recognition for a specified period is not binding, if the charge, although not so described, is in fact reversionary (*y*). A condition to give a specified indemnity will be specifically enforced in Equity (*z*).

Indemnity
against
charges, &c.

It has become very usual to insert conditions (*u*) restrictive of the time within which objections or requisitions may be taken, or made by the purchaser; and enabling the vendor to annul the sale, if objections are taken, or requisitions made, which he is unable or unwilling to remove or comply with; the latter condition, in fact, is inserted by many practitioners, as a matter of course, in all but the very plainest cases; and is now commonly introduced even on sales by the Court of Chancery; and is not such a depreciatory condition as may not be used by a fiduciary vendor (*b*). The condition should be framed so as to entitle

Time for
objections,
and for
rescinding
contract.

(*u*) See *Torrance v. Bolton*, L. R. 14 Eq. 124; L. R. 3 Ch. Ap. 118, where the incumbrances were mentioned in the conditions, but not in the particular, and this was held to be insufficient.

(*x*) See 1 Dev. Conv. 627. As to how a general agreement to give an indemnity will be carried out, see *Cottrell v. Watkins*, 1 Beav. 361;

Casamajor v. Strode, 1 Wils. C. C. 428.

(*y*) *Drysdale v. Mace*, 5 De G. M. & G. 103.

(*z*) *Walker v. Barnes*, 3 Madd. 247.

(*a*) Their validity recognized, *Blackburn v. Smith*, 2 Exch. 783; *Powell v. Smithson*, 20 L. T. 105, L. C.

(*b*) *Falkner v. Equitable Ry. Society*, 4 Drew 352.

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the vendor to rescind, not merely on the purchaser insisting upon some objection as to title, but on his insisting on any objection or requisition as to either title or conveyance; and should provide that the right may be exercised notwithstanding any intermediate negotiation in respect of such objection or requisition.

When vendor
 justified in
 rescinding.

A vendor is entitled under such a condition to rescind the contract, notwithstanding that it provides for compensation in case of any error or mistake in the description of the property or of the vendor's interest therein (c); and he may do so even after a bill has been filed by the purchaser for specific performance, and a subsequent waiver of the objection will not revive the contract (d); and where the vendor himself files a bill for specific performance he may, it seems, at any time before the cause comes on for hearing, rescind under such a condition, but only upon the terms of getting his bill dismissed with costs (e). But where the vendor's right to rescind arises on the purchaser's insisting on an objection, which the vendor is unable or unwilling to remove, the latter is not justified in rescinding, if the former, on being made acquainted with the fact, at once waives his objection (f); and the vendor must first answer the requisitions, even though some of them may be untenable, and thus give the purchaser an opportunity of waiving them (g). If the condition be for rescinding the contract, in case the title shall not prove "satisfactory" to the purchaser, this will not authorize him to make any other than the usual objections (h).

"Satisfactory"
 means
 "marketable"
 title.

Time should
 be limited
 within which

The condition, in order to preclude questions on the point, should limit a time within which further requisitions or

(c) *Moulton v. Fletcher*, L. R. 10 Eq. 212; *affd.* L. R. 6 Ch. Ap. 91;

where, according to the particular, the estate contained freestone and limestone, which, however, belonged to the lord, and not to the vendor.

(d) *Hou v. Smithies*, 22 Beav. 510.

(e) *Ward v. Dickson*, 5 Jur. N.S. 698.

(f) *Duddell v. Simpson*, L. R. 1 Eq. 578; L. R. 1 Ch. Ap. 102.

(g) *Greaves v. Wilson*, 25 Beav. 290
Terpin v. Chambers, 29 Beav. 104.

(h) *Lord v. Stephens*, 1 Y. & C. 223.

objections, in answer to replies or further documents furnished by the vendor, must be sent in by the purchaser.

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further objections are to be taken.

But the condition does not apply where the objections are not apparent on the abstract.

But a condition restrictive as to the time within which the purchaser's requisitions are to be made cannot be relied on, where there are grave objections to the title, which are not discoverable on the face of the abstract. In one case (*i*), V.-C. Kindersley, on dismissing the plaintiff's bill for specific performance, said that under the ordinary condition limiting the time for making requisitions, if facts were subsequently discovered showing that the vendor had no title, or a bad title, or one open to the greatest possible doubt, he for one would never hold that the purchaser was precluded from raising objections, if the facts on which they were founded were not known to him when he delivered his requisitions.

Nor can the condition be relied upon by a vendor who knowingly enters into the contract with a clearly defective title to a portion of the estate: for instance, where a person entitled in remainder subject to a life estate, contracted to sell the fee simple in possession, hoping that the tenant for life would concur, which she refused to do, the purchaser was allowed to take the reversion with a compensation, although there was a condition for rescinding the contract if a good title could not be made, which condition the vendor wished to enforce (*k*): nor does the condition apply where the vendor has been guilty of wilful misrepresentation (*l*): whether or no it applies to a case which falls within a condition as to compensation seems to be doubtful (*m*); and a vendor cannot make use of such a condition for the purpose of getting rid of the duty which attaches to him upon the

Or where vendor knowingly sells defective title.

(*i*) *Warde v. Dickson*, 5 Jur. N. S. 698.

(*k*) *Nelthorpe v. Holgate*, 1 Coll. 203; but see *Thomas v. Dering*, 1 Ke. 729; and see also *Mawson v. Fletcher*, L. R. 10 Eq. 212; E. R. 6 Ch. Ap. 91, where the vendor, notwithstanding the clause as to compensation, was

held entitled to rescind, and see *supra*, p. 158.

(*l*) See *Price v. Mansculay*, 2 De G. M. & G. 347.

(*m*) *Hoy v. Smith*, 22 Beav. 510. Compare *Mawson v. Fletcher*, L. R. 10 Eq. 212; L. R. 6 Ch. Ap. 91.

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rest of his contract: thus if he has undertaken to give possession, he cannot avail himself of the condition to escape compliance with the purchaser's requisition that a party wrongfully in possession shall be ousted before completion (n).

Or where
purchaser is
willing to
complete.

Nor does the condition enable a vendor to refuse to show a title, or to procure the concurrence of a mortgagee, if he sells free from incumbrances (o); or to rescind the contract, as against a purchaser who is willing to waive the objection or requisition, and take the property without compensation (p): but it enables a vendor, who has in fact a good title, and who has duly performed his duties under the contract, to rescind upon a requisition being insisted on, which is either frivolous or untenable, or which, on the ground of expense or for other sufficient cause, he cannot reasonably be expected to comply with (q). Thus, where time was made of the essence of the contract, and on the day named for completion, the vendor executed the conveyance, and demanded payment of the purchase money, which the purchaser refused on the ground that two requisitions as to the registration of a deed and the sufficiency of a stamp, (both of which the vendor was able and had undertaken to comply with,) were still unsatisfied, the vendor, having given notice of his intention, was held justified in rescinding the contract (r).

Where the
condition does
apply.

The condition is usually framed so as to cover objections and *requisitions*, "whether in respect of title, conveyance, or otherwise" (s). Where, however, a purchaser required that certain annuitants, whose concurrence was held unnecessary, should join in the conveyance, it was considered that this was an objection to the *title* within the meaning of the con-

(n) *Engel v. Fitch*, L. R. 3 Q. B. 414; and see *Greaves v. Wilson*, 25 Beav. 290. 4 Beav. 282; *Wilson v. Edwards*, 2 Sim. 72.

(o) *Greaves v. Wilson*, 25 Beav. 290.

(p) *Greaves v. Wilson*, 25 Beav. 290.

(q) *See and compare Roberts v. Wyatt*, 2 Taunt. 269; *Pigg v. Adam*,

(r) *Greaves v. Wilson*, 25 Beav. 290.

dition (t). But the condition should in terms extend to requisitions. Where ordinary leaseholds were erroneously stated to be renewable by custom, this was held to be a misdescription of the subject matter of sale, coming within the compensation clause; and not a defect in title within the meaning of the condition for rescinding (u): so, where the amount of the fines was mis-stated on the sale of a manor (x).

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It has been held that a vendor by replying to the purchaser's objections or requisitions, waives the right to rescind the contract, and also the benefit of the condition limiting the purchaser's time for taking objections, &c. (that is, supposing them not to have been taken within such limited time) (y); but according to modern decisions a vendor cannot properly exercise his right to rescind, until he has first answered the requisitions, and given the purchaser an opportunity of withdrawing them (z). And the right to rescind may, of course, be lost by acquiescence in, or confirmation of the contract (u); or by a parol variation of the condition, the non-compliance with which gave the right to rescind (b).

Right to
rescind lost
by replying to
objections.

It seems, however, probable that mere argumentative replies would not amount to such a waiver: and that replies of any description, if returned "without prejudice," or with any similar reservation of the vendor's rights, would escape the rule above referred to (c): or it may, it is conceived, be avoided, by the introduction, into the condition, of the words "notwithstanding any intermediate negotiations," or some equivalent expression.

Exceptions
from rule.

For the purposes of such conditions, time runs from the delivery of a perfect abstract (d); that is, an abstract

Time runs
from delivery
of "perfect
abstract."

(t) *Page v. Adam*, 4 Beav. 269.

(u) *Painter v. Newby*, 11 Ha. 28.

(x) *Hoy v. Smithies*, 22 Beav. 510.

(y) *Tunner v. Smith*, 10 Sim. 410;
see the same case on appeal, 4 Jur.
310; *Cutts v. Thodey*, 18 Sim. 206;
Lane v. Debenham, 11 Ha. 188;

M'Culloch v. Gregory, 1 K. & J. 294.

(z) *Vide suprd*, p. 158.

(u) *Suprd*, p. 105.

(b) *Dawson v. Yates*, 1 Beav. 301.

(c) See *Morley v. Cook*, 2 Ha. 106.

(d) *Hobson v. Bell*, 2 Beav. 17.

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perfect as the vendor, at the time of delivery, has in his either actual or constructive possession (*e*); or, (as a learned judge has expressed it,) an abstract "which contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes part of the vendor's title" (*f*): but a vendor would not be at liberty designedly to deliver an imperfect abstract, or otherwise to neglect his duties under the contract, for the purpose of rescinding the contract under such conditions (*g*).

Objections on
subsequent
evidence.

And the condition as to time does not preclude a purchaser from taking subsequent objections arising out of evidence called for before the expiration of the limited time (*h*): such objections must, however, it is submitted, be taken within a corresponding period after the production of such evidence (*i*).

As to resale,
and forfeiture
of deposit;
how far
binding.

It is usual, and proper, to insert a condition providing for a resale of the property, and forfeiture of the deposit, in case the purchaser fail to comply with the conditions (*k*); and that any deficiency upon such resale, together with the costs thereof (*l*), shall be borne by the purchaser. Equity, however, will, at least when the purchaser is bankrupt (*m*), set off the deposit against such deficiency; and the vendors equitable right to the deposit in any case where the pur-

(*e*) *Morley v. Cook*, 2 Ha. 111; *Steer v. Crouley*, 9 Jur. N. S. 1292 C. P.

(*f*) V. C. Kindersley, in *Oakden v. Pike*, 11 Jur. N. S. 666; and see *Parr v. Lovegrove*, 4 Drew. 170.

(*g*) *Page v. Adam*, 4 Beav. 269; *Morley v. Cook*, *ubi supra*; *Roberts v. Wyatt*, 2 Taunt. 268.

(*h*) *Bluckloc v. Laws*, 2 Ha. 40; *Morley v. Cook*, *ibid.* 112.

(*i*) See and consider *Sherwin v. Shakespeare*, 5 De G. M. & G. 530; and *vide supra*, p. 158.

(*k*) See *Gee v. Pearce*, 2 De G. & S. 341.

(*l*) It has been held that these costs cannot be proved in Bankruptcy, although the vendor may apply the proceeds of a resale in their discharge, and then towards the payment of the original purchase-money, and may prove for the deficiency: *Ex parte Hunter*, 6 Ves. 26; and see *Ex parte Lord Seaforth*, 1 Ro. 306; and *Ex parte Gyde*, 1 Gl. & J. 323; but see and consider 12 & 13 Vict. c. 106, ss. 177, 178; 24 & 25 Vict. c. 134, s. 188; and see Griffith & Holmes' Bankruptcy Law, pp. 587 et seq. 32 & 33 Vict. c. 71, s. 31.

(*m*) *Ex parte Hunter*, 6 Ves. 94.

chaser is able and willing to put him in the situation in which he would have been had the contract been duly performed, is doubtful (*n*); but the condition can be enforced at Law (*o*). If, upon a resale, the estate were to produce more than the original purchase-money, the purchaser who had violated his agreement could not call for an account of the surplus (*p*). A stipulation that the purchaser making default shall pay a specified sum (exceeding the amount of the deposit,) as liquidated damages, does not amount at Law to a condition for the forfeiture of the deposit (*q*): nor is the usual condition for forfeiture of the deposit any bar to an action for general damages, if the purchasers refuse to complete (*r*); but after a resale at a loss the vendor cannot sue for the original purchase-money (*s*). Where the deposit has been forfeited, and the vendor claims for the deficiency on the resale, the deposit will be taken into account in assessing the damages (*t*). The omission by fiduciary vendors to enforce the common clause, is not necessarily a breach of trust (*u*).

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Condition
for payment
of penalty
distinguished.

In the preparation of special conditions it is important to remember, that a purchaser, unless specially precluded from so doing, may require evidence of all matters of fact stated in any condition which goes to restrict his *prima facie* rights (*x*). It has, in fact, been suggested (*y*), that the ordinary condition throwing upon the purchaser the expense of procuring evidence to verify the abstract, does not preclude him from requiring all such information as to facts as is necessary to complete the abstract: so that, although precluded from requiring, except at his own expense, any evidence of a death (material to the title), he may yet insist on being informed when and where such death occurred: in

Facts stated
must be
proved.

Whether
purchaser
precluded
from evidence
may require
information.

(*n*) *Moss v. Matthews*, 3 Ves. 279; Sug. 39; and *vide infra*, Ch. V. s. 4.

(*o*) *Nicoll v. Chambers*, 11 C. B. 996.

(*p*) *Per Curiam*, 6 Ves. 97.

(*q*) *Palmer v. Temple*, 9 Ad. & E. 508.

(*r*) *Icely v. Grew*, 6 Nev. & M. 467.

(*s*) *Lamond v. Darall*, 9 Q. B. 1030.

(*t*) *Ockenden v. Henley*, 4 Jur. N. S. 999; 1 Ell. Bl. & Ell. 485.

(*u*) *Thomson v. Christie*, 1 Macq. H. L. C. 236.

(*x*) *Symons v. James*, 1 Y. & C. C. 487. See *Johanson v. Smiley*, 17 Beav. 233.

(*y*) *Jarm. Conv.* vol. ix. p. 53.

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many cases the expense of obtaining such information would be nearly the same as that of obtaining the usual evidence of the fact; and the point, although (it is conceived) not often insisted or capable of being insisted on in practice, may sometimes be usefully guarded against by the conditions.

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As to what special conditions are generally requisite in various specified cases.

What conditions expedient on sale of inclosed lands.

(4.) *As to what special conditions are generally requisite in various specified cases.*

Upon a sale of lands held under an Inclosure Act, it will often be expedient to negative the purchaser's *prima facie* right to evidence of the validity and regularity of the award; and attention must be paid to the rule which, when an allotment has been made indiscriminately in respect of lands held under different titles, requires the production and proof of all such titles; a rule which, if not guarded against, may occasionally lead to expenses which will swallow up the purchase-money (a). This precaution, however, as to the validity and regularity of the award, is not necessary where the case falls within the 3 & 4 Vict. c. 31, which provides that all awards made in pursuance of that Act, or under the General Inclosure Act (6 & 7 Wm. IV., c. 115), shall be conclusive evidence that all the provisions of those Acts have been complied with, and that no other evidence than the awards shall be requisite to establish the title. The want of enrolment of the award is remedied by the 3 & 4 Will. IV., c. 87, in cases where the award was executed before the passing of the Act; and by the 17 & 18 Vict. c. 97 (b), the Commissioners are enabled to extend the time for enrolment. Where the estate, in respect of which the allotment is made, is conveyed to the purchaser prior to the actual award, the right to the allotment goes with it (b); and an allottee may, before the actual award, sell and convey the legal estate in his allotment, apart from the right or interest in respect of which it is allotted (c).

(a) *Dav. Conv.* 1, 462.

(a) See sect. 7.

(b) *Doe v. Willis*, 5 Bing. 441; *Sagd.* 374; and see now 3 & 9 Vict. c. 118, s. 84.

(c) See *Kingley v. Young*, 17 Ves. 468, *affd.* 16 Ves. 307; *Doe v. Saunder*, 5 Ad. & El. 664, and cases cited; and see 3 & 9 Vict. c. 118, s. 84.

It will also generally be proper to insert a condition in respect to any reservations or liabilities under the Act or award. Such a reservation, *e.g.*, of mines and the right to work them, or manorial rights generally, will, if expressed in general terms, affect lands sold by the Commissioners for the payment of expenses, as well as ordinary allotments (*d*).

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Where the property comprises strips of waste land recently inclosed, some special stipulations as to title will almost invariably be necessary (*e*).

Land formerly waste.

In some districts it seems to have been a common practice for parties to inclose such strips with the permission of the lord of the manor, upon payment to him of a small annual sum, but without any assurance or written agreement; and then to deal with them as freehold, subject to a chief rent. In such a case the tenure seems to be merely that of a yearly tenancy.

As between landlord and tenant, the former is presumably entitled to encroachments made by the latter during his tenancy (*f*); but this general presumption may be negatived by evidence proving the tenant's title (*g*); and it is not necessary that the encroachment should be contiguous to the land held by the tenant; but only that it should be in such proximity as to lead to the presumption that his position as tenant enabled him to approve (*h*). In the absence of an express stipulation to the contrary, there is in Equity an implied agreement that the tenant is to hold any encroachment upon the same terms as his original lease (*i*). Where part of

Encroachments.

(*d*) *Buckleuch (Duke of) v. Wakefield*, L. R. 4 E. & Ir. Ap. 377.

(*e*) See, as to the presumption of ownership of such strips, *Steel v. Prickett*, 2 Stark. N. P. C. 463; *Doe v. Pearsey*, 7 B. & C. 304; *Grose v. West*, 7 Taunt. 39; and *Scroones v. Morrell*, 1 Beav. 251; *et vide infra*, Ch. VIII.

(*f*) See *Doe d. Lloyd v. Jones*, 15 M. & W. 580, and cases cited; and

see also, as to encroachments, &c., by trustees, *Att.-Gen. v. Corp. of Cusker*; 3 Dru. & W. 294, 309.

(*g*) See *Doe v. Mussey*, 17 Q. B. 373; *Andrews v. Hoiles*, 2 El. & B. 349; *Doe v. Tidbury*, 14 C. B. 304; *Kingsmill v. Millard*, 11 Exch. 313.

(*h*) *Earl of Lisburne v. Davies*, L. R. 1 C. P. 259.

(*i*) *White v. Wackley*, 4 Jur. N. S. 988; see, and distinguish, *Drummond*

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the property consists of an encroachment, and either the ordinary presumption, or the evidence rebutting it, is doubtful, a special stipulation as to title will be necessary.

**Grants from
the Crown.**

Upon a sale of tithes held as lay property, or of other property held under a grant from the Crown, the vendor should protect himself from being required to produce the original grant, if it is lost or not in his possession.

**Enfranchised
copyholds.**

Where the property has been recently enfranchised (*k*), the production of the manorial title must be guarded against, if the vendor be unable to produce it: or, if produced, it may sometimes be well to guard against any question as to the right of the purchaser to require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the earlier title (*l*). Where, however, the enfranchisement has been effected under the General Enfranchisement Act, it is not necessary to show the lord's title (*m*).

**Whether a
person
assuming to
act as lord can
enfranchise.**

By the 4 & 5 Vict. c. 35, enabling enfranchisement by voluntary arrangement, the word "lord" is to include a person filling that character, or acting in that capacity, *whether right-fully entitled or not* (*n*); and by the 15 & 16 Vict. c. 51, it is to include a person seised for life, or in tail, or in fee simple, and the words italicized are omitted (*o*). Notwithstanding the omission, it would seem that a compulsory enfranchisement under the latter Act may be effectual, even in cases where the person assuming to act as lord has no title (*p*).

**Copyholds
formerly
waste.**

Where, in the case of copyholds, the title depends upon

v. Sanf, L. R. 6 Q. B. 763. As to validity of settlements by parties holding by encroachment or otherwise by a voidable title, see *Yem v. Edwards*, 1 De G. & Jo. 599.

(*k*) *Vide infra*, Ch. VIII.

(*l*) See 1 Jarm. Conv. by S. § 3.

(*m*) *Kerr v. Pearson*, 25 Beav. 394; and see 4 & 5 Vict. c. 35, s. 64; 6 & 7

Vict. c. 23; 7 & 8 Vict. c. 55, s. 45 & 16 Vict. c. 51; 16 & 17 Vict. c. 57; 21 & 22 Vict. c. 94.

(*n*) Sect. 102.

(*o*) Sect. 52.

(*p*) See and consider *Kerr v. Pearson*, *ubi supra*, and 21 & 22 Vict. c. 94, s. 2, repealing the 11th section of 15 & 16 Vict. c. 51.

grants, made by the lord of the manor, of part of the waste, it will, in general, be expedient to provide that no evidence shall be required of such grants being authorized by the custom of the manor: in some manors, however, the right is well established.

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When property is sold subject to agreements for leases, it should be seen that the agreements are properly stamped, or any requisition founded on the want of a stamp should be guarded against (q).

Unstamped
agreement.

Upon a sale of leaseholds, the following points will require attention :—

Leaseholds.

To negative the purchaser's right to the production of the lessor's title, if, as usually happens, the vendor cannot produce it; if the interest to be sold be an underlease, the condition should (if so intended) clearly refer to the title as well of the sub-lessor as of the original lessor; but if the lease be by a Bishop, of lands held by him in right of his see, a purchaser has no *prima facie* right to production, and any condition respecting the lessor's title may be omitted (r). The same rule would, it is conceived, prevail in the case of a lease by a Dean and Chapter. A condition that the lessor's title shall not be objected to will not, it is conceived, absolutely bind the purchaser if there is a material flaw in the title, endangering his safety, which is not disclosed by the vendor (s).

Against
production of
lessor's title.

The necessity for such a condition, at any rate on the sale of a derivative lease, or of an underlease, is not superseded by the Vendor and Purchaser Act 1870, which provides as one of the rules which, subject to express stipulation, are to regulate the obligations and rights of vendor and purchaser, that under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign is not to be entitled

Rule against
production in
V. & P. Act,
1874.

(q) *Smith v. Wyley*, 16 Jur. 1136.

(s) *Lecoy v. Mogford*, 2 Jur. N. S.

(r) *Vide infra*, Ch. VIII.

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to call for the title to the freehold (f). According to this rule, the purchaser of an underlease may, in the absence of express stipulation "call for" the title of his sub-lessor; nor, it is conceived, is such a purchaser, or a purchaser of the original lease, precluded by this rule from making any objection or requisition, not involving an actual production, in respect of the freeholder's title, or from requiring proof of his right to grant the lease. "To call for the title" would seem naturally to mean "to call for its production" or, "to require it to be deduced;" but even if the rule could be construed as precluding the right to make any requisition in respect of the title, it is still less comprehensive than the condition in ordinary use; which, when it is in the form that the lessor's title shall not be inquired into, may, as we have seen (u), preclude an objection taken *aliunde*.

Covenants in
lease, how to
be noticed.

The covenants in the lease should never be referred to as "usual:" except, perhaps, in the case of property forming part of a large estate, where the form of the leases is a matter of notoriety: the preferable plan is, to produce an abstract or copy of the lease at the time of sale; and to state the intention so to do in the particulars or conditions, and to stipulate that the purchaser shall be deemed to have full notice of its contents: but, a reasonable opportunity of examining it should be allowed him (x).

What are
"usual cove-
nants."

Covenants to pay land-tax, sewers' rate, and all other taxes, and a proviso for re-entry, if any but a specified business shall be carried on, have been held to be "usual" (y); so in a lease of an hotel, a condition of re-entry on the lessee's becoming bankrupt (z); so, too, a covenant that the lessee shall make good any damage occasioned by fire (a); and where a landlord agreed to demise at a yearly rent "free of all outgoing," and to grant a lease on the above and other "usual" terms,

(f) 37 & 38 Vict. c. 78, sect. 2.

(u) *Vide supra* p. 150. *Hume v. Bentley*, 5 De G. & S. 520.

(x) *Brumfi v. Norton*, 3 Jur. N. S. 1198.

(y) *Rennett v. Womack*, 7 R. & C.

627; *Bradbury v. Wright*, 2 Doug. 624.

(z) *Haines v. Barnett*, 27 Beav. 500; but not in a mining lease, *Hodgkinson v. Ours*, W. N., 1875, p. 81.

(a) *Kendall v. Hill*, 6 Jur. N. S. 948.

it was held that the liability to pay the land-tax and tithe commutation rent-charge fell upon the tenant (b); so, too, an exceptional expense, incurred for a permanent improvement under the Metropolis Management Acts, has been held to fall within the ordinary tenant's covenant to pay all rates and assessments whatsoever in respect of the premises (c); but a covenant restrictive of the right of alienation is not a "usual" covenant (d).

It is also, in general, necessary to provide that certain specified evidence (usually the production of the last receipt for rent), shall be sufficient evidence of the performance of and compliance with the covenants and conditions in the lease, up to the completion of the purchase. Where the condition was, that "the possession under the lease should be deemed conclusive evidence of the due performance, or sufficient waiver of any breach, of the covenants in the lease up to the completion of the sale," it was held that the purchaser was fixed with notice of possible breaches of covenant prior to the contract, which must be taken to be waived; but no opinion was expressed as to what would have been the effect of the condition, if it had been proved that the landlord intended to enforce the forfeiture (e): and the condition was held not to cover breaches committed by the vendor himself after the contract, and before the completion of the sale. It is conceived, however, that any subsisting breach, if within the vendor's knowledge, ought to have been expressly mentioned; and that the condition was properly applicable only to breaches, of which he had no notice, or which he had good reason for believing to be waived. Nor will such a condition bind the purchaser if there is a reasonable *bond fide* doubt as to who is the reversioner entitled

As to evidence of covenants, &c., having been performed.

(b) *Parish v. Sleeman*, 1 De G. F. & Jo. 326; in effect overruling *Cranston v. Clarke*, Sayer 78.

(c) *Thompson v. Lapworth*, L. R. 3 C. P. 149.

(d) *Buckland v. Papillon*, L. R. 1 Eq. 477; L. R. 2 Ch. Ap. 67. As to the covenants which ought to be in-

serted in a building or repairing lease, see *Easton v. Prate*, 9 Jur. N. S. 1345. As to the effect of the qualifying words "but such consent is not to be arbitrarily withheld" see *Treloar v. Bigge*, L. R. 9 Exch. 151.

(e) *Howell v. Kightley*, 21 Beav. 331.

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Where there
has been a
breach of the
covenant to
insure.

Now remedied
by the 22 &
23 Vict. c. 35.

to receive the rent (*f*). Where it was stipulated that the production of the last receipt for rent should be conclusive evidence that all the covenants had been performed, the purchaser was precluded from objecting that the lease had been forfeited by reason of dilapidations, which existed at the date of the contract (*g*). A difficulty of this kind has often arisen upon the covenant to insure against fire. Where there has been merely a past omission to insure, but the existing insurance is according to the terms of the covenant, the condition as to waiver may be relied on; but where the existing insurance is improperly effected (*h*), there is a continuous breach *de die in diem* of the covenant to insure and keep insured in the specified manner, and the sufficiency of the condition may be open to serious question (*i*). We may remark that the omission for a single day to pay the premium within the time allowed by the office is a breach of covenant inducing a forfeiture; and is not cured by the subsequent acceptance of the premium by the office (*k*). Now, however, *bona fide* purchasers are, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, protected against forfeiture of the lease, by reason of a prior breach of the covenant to insure, if they have a receipt for the last payment of rent, and there is a valid insurance on foot at the time of completing the purchase; and it has been held that if the breach has been committed since the passing of the Act, the Court has power under the 4th section to relieve against the forfeiture, notwithstanding that the covenant broken was entered into previously to the Act (*l*): but a vendor, in the absence of a condition to that effect, cannot compel a purchaser to rely upon this section of the Act (*m*).

Title of reversioner when

If a waiver, either express, or made sufficient by the con-

(*f*) *Pygler v. White*, 10 Jur. N. S. 330.

(*g*) *Dall v. Hutchins*, 32 Beav. 615.

(*h*) See *Penniall v. Harborne*, 11 Q. B. 308; *Havens v. Middleton*, 10 Ha. 641.

(*i*) *Hosell v. Kightley*, *supra*.

(*h*) *Wilson v. Wilson*, 14 C. B. 616;

Job v. Danister, 2 K. & Jo. 374; *affd.* 5 W. R. 177. The Crown can waive a forfeiture by acceptance of rent; *Bridges v. Longman*, 24 Beav. 27.

(*l*) *Page v. Bennett*, 2 Giff. 117; 6 Jur. N. S. 419.

(*m*) *Turner v. Marriott*, V.-C. K., 31 July, 1866.

ditions, be relied on by the vendor, and the landlord giving it is a different person from the original lessor, a condition precluding investigation of the lessor's title will not preclude the purchaser from requiring the title to be traced from the original lessor to the person whose waiver of the breach of covenant is relied on (*n*).

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to be shown in
case of waiver.

When leasehold property is sold in lots, it is also necessary to provide for the apportionment of the rents and liabilities under the lease (*o*). This cannot be done effectually where, as is usually the case, the lessor refuses, or is incompetent, to concur. Underleases, (the original term being retained either by the vendor or one of the purchasers,) with covenants for mutual indemnity, are frequently resorted to; in fact, necessarily so, where, in the case of buildings, the original lease contains a covenant to insure against fire in a given sum: and in such a case, the assignee of the lease must covenant to indemnify the other purchasers against any breach of the covenants of the original lease in respect of any part of the property (*p*). Cross powers of distress and entry are often relied on in other cases: but the plan proposed, whatever it be, should be stated in the conditions (*q*). The same point arises on a resale, in parcels, of freehold land which has been sold subject to a reserved rent and covenants.

As to apportionment of rent and liabilities on sale in lots.

Upon the sale of renewable leaseholds, it will probably be necessary to provide against the production of the title prior to the subsisting lease (*r*).

On sale of renewable leaseholds.

Upon the resale of a reversion, it may often be prudent to provide, that no evidence shall be required of the sufficiency of the consideration paid on the original purchase (*s*); if such purchase, however, were by auction, or were subsequent

On sale of a reversion.

(*n*) *Turner v. Marriott*, *ubi supra*.

(*o*) See *Taylor v. Martindale*, 1 Y. & C. C. C. 658; *Barnwell v. Harris*, 1 Taunt. 490; *Bowles v. Waller*, Hay. 441 (where a receipt by a Crown collector was held to be evidence of apportionment); and see note to *War-*

ren v. Bateman, 1 Fl. & K. 455.

(*p*) *Brown v. Paull*, 2 Jur. N. S. 317.

(*q*) See 1 Dav. Conv. 475.

(*r*) *Vide infra*, Ch. VMI.

(*s*) See *Boswell v. Mcndham*, 6 Madd. 373; see now 31 Vict. c. 4.

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to 1st January, 1868, the condition would seem to be unnecessary (f).

As to covenants on sale by trustees, &c.

Although it is a general rule that a trustee or mortgagee, &c., enters into no covenant for title except that against incumbrances (v), it is not unusual, and is perhaps expedient, to insert a special condition to that effect.

Section 5.

(5.) *General remarks on special conditions.*

General remarks on special conditions.

As to use of special conditions by trustees, &c.

Upon sales by trustees, mortgagees, and other persons filling a fiduciary character, great care is requisite in the use of special conditions; since, if improperly used, they may not only involve the vendors in personal liability to their *cestui que trust*, &c., (x), but also prevent their making a good title.

When it amounts to breach of trust.

In order to have this effect the conditions must be unnecessary, and of such a depreciatory character that their use amounts to a breach of trust: it may, however, often be difficult to determine whether a given condition comes within this definition (y).

Use of certain special conditions by mortgagee approved of.

Upon a sale by a mortgagee, the use of conditions compelling a purchaser to take all objections within twenty-one days from the delivery of the abstract, that all copies of deeds, &c, not in the vendor's possession, should be obtained at the expense of the purchaser, that any mis-statement, &c., should not annul the sale but be the subject of compensation, and that the vendor might resell on breach of conditions by the purchaser, was considered by Lord Langdale to form no objection to the title (z).

(f) *Chelley v. Nash*, 3 Madd. 232; *et vide infra*, Ch. XIV. s. 2.

(v) See *Worley v. Frampton*, 5 Ha. 540.

(x) See *Dance v. Goldingham*, L. R. 3 Ch. Ap. 942, and *vide infra*, p. 174.

(y) As to special conditions generally, see remarks of the M. R. in *Hoy v. Smithies*, 22 Beav. 510; *Greaves*

v. Wilson, 25 Beav. 290; and as to depreciatory conditions, see *Falkner v. Equitable Rev. Soc.*, 4 Drew. 352; *Rede v. Oakes*, 10 Jur. N. S. 1246; and *vide supra*, p. 73.

(z) *Hobson v. Bell*, 2 Beav. 17; and see *Borell v. Douglass*, 2 Ha. 448, 445; and *Groom v. Booth*, 1-Dra. 548.

Upon a sale by a mortgagee, with a title believed to be marketable, although complicated, the use of a condition authorizing the mortgagee, in the event of objections, &c., being taken which he could not remove, to rescind the contract on returning deposit, interest, and costs, and of a condition that purchasers, whose purchase-money should not amount to a specified sum, should pay for their abstracts, (except the abstract of the mortgage deed,) was sanctioned by the late Mr. Duval. The former condition has since been held to be one which a prudent owner would introduce, and therefore binding on the mortgagor (*a*).

On a sale in a single lot, there seems to be considerable difficulty in drawing any distinction between a condition throwing on a purchaser the expenses of copies of deeds, &c., (as in *Hobson v. Bell*), and one imposing on him *any* expenses connected with the sale which would be incurred merely on his own requisition, whether regarding the verification of the abstract or otherwise: in each case the purchaser submits to pay certain indefinite expenses in the event of his insisting on their being incurred; and, in general, the trust estate probably saves in costs what it loses in purchase-money. The case, however, is different on a sale in several lots, where the expenses of verifying the abstract are thrown generally on the purchasers; for then, although the expenses can be but once saved to the estate, each purchaser may think that he will have to bear them, and may be supposed to reduce his biddings accordingly.

As to expenses; difference suggested between use of such conditions by trustees, &c., on sale in several lots and on sale in one lot.

Conditions restrictive of a purchaser's right to a marketable title, or the ordinary evidences of title, should be used only so far as may be requisite from the state of the title (*b*). Where, on a sale by trustees, it was stipulated that the purchaser should accept a seventeen years' title as to part of the property, and the condition did not specify that the portion so restricted in title was only of small extent as

As to title, &c., should be adapted to particular title.

(a) *Falkner v. Equitable Rev. Socy.*
4 Drew. 352.

(b) *Supra*, p. 73; see, however,
Borell v. Dann, 2 Ha. 443, 455.

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compared with the whole, and not essential to the enjoyment of the property, it was considered doubtful whether such sale would be binding on the *cestui que trust* (c).

Where a deed dated in 1819 which formed the root of title, had been mislaid, and the vendors who were trustees for sale stipulated that the title should commence with a deed dated in 1858, and that no earlier title should be called for except at the purchaser's expense and without stating, as was the fact, that the title, as commencing in 1819, was recited in the deed of 1858, the condition was held to be depreciatory, and, at the instance of a *cestui que trust* who had only a small interest, the completion of the sale was restrained (d). The trustees ought to have commenced their title with the deed of 1819, and to have stipulated for the verification of the abstract by means of a copy of the deed; or by making the recitals in the deed of 1858 evidence.

Power to sell
under special
conditions :
its effect.

Powers of, and trusts for, sale, at the present day, usually authorize a sale "under special conditions as to title, evidences of title, expenses, or otherwise." Such an authority may reasonably be supposed to give to a fiduciary vendor, somewhat wider limits than he would otherwise enjoy, and would probably turn the scale in a doubtful case; but it is hard to say what is its precise effect. It certainly would not authorize capricious or obviously unnecessary conditions, and necessary or provident conditions may and should be used *without* an express authority; and, looking to the present state of practice, it must be a very gross case in which a willing purchaser could be advised to insist upon the use of depreciating conditions as an objection to the title: it has, however, become usual to insert in such trusts and powers a declaration, that the use of unnecessary or improper conditions shall not affect the sale; but even such a declaration does not relieve a fiduciary vendor from liability to his beneficiaries.

As to declaration
that
improper con-
ditions, &c.,
shall not
affect pur-
chaser.

(c) *Reade v. Oakley*, 10th Jur. N. S. 1246.

(d) *Dance v. Goldingham*, L. R. 8 Ch. Ap. 902.

We may here remark that the circumstances of an estate being sold under conditions restrictive of the title, does not necessarily protect a purchaser from being affected with implied notice of matters, which he would have discovered by the ordinary investigation which follows an open contract (e)

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Restrictive conditions do not necessarily protect a purchaser from notice of what might be learnt by inquiry.

Condition as to modifying sale plan on sale of building estate.

Upon a sale of an estate laid out as building land, it may often be desirable to reserve power for the vendor to modify the arrangements indicated by the sale plan, for the laying out of the land, and the formation of roads and other accommodation works, in case any of the lots remain unsold.

The condition as to compensation for misdescription by the vendor, cannot, it appears, be enforced upon a sale by trustees, &c. (f): although the use of the condition may not in itself be a breach of trust (g).

Condition as to misdescriptions useless to trustees, &c.

In a modern case, the Court decreed specific performance of a contract for sale by trustees, in which it was provided that their receipts should be sufficient discharges for the purchase-money, and that the purchaser should not require the concurrence of the *cestuis que trust*,—thus supplying the omission of the ordinary receipt clause in the trust instrument (h).

Specific performance under special conditions.

Fiduciary vendors are justified in laying the title and conditions of sale before counsel; and the costs of so doing by assignees in bankruptcy have been allowed as against an incumbrancer who had petitioned for the sale, but whose demand the proceeds of sale were insufficient to satisfy (i); and upon a sale by the Court of Chancery, the title is perused, and the conditions of sale are settled, by one of the

Costs of consulting counsel allowed.

(e) *Peto v. Hammond*, 30 Beav. 495; *Morland v. Cook*, L. R. 1 Eq. 252, and cases cited, *ib.* 256.

(f) *White v. Cuddon*, 8 Cl. & F. 766.

(g) See *Hobson v. Bell*, 2 Beav. 17.

(h) *Wilkinson v. Hartley*, 15 Beav. 183; and see *Groom v. Booth*, 1 Dre. 548.

(i) *Ex parte Lewis*, 3 M. D. & De G. 173.

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Sect. 5.**

conveyancing counsel of the Court, in all but very exceptional cases.

**Power of
trustees under
V. & P. Act,
1874.**

By the Vendor and Purchaser Act, 1874, trustees who are vendors may sell without excluding the operation of the rules which are prescribed by the Act for the future regulation of the obligations and rights of vendor and purchaser in the completion of contracts for the sale of land (k); but they might, it is conceived, have done so, even land without express enactment.

**Concluding
remarks on
special con-
ditions.**

Lastly, it may be remarked, that those conditions which to an unprofessional eye appear the simplest, are often the most dangerous; and those which appear difficult and complex to the unlearned purchaser may not unfrequently produce an impression favourable to the title upon the mind of his legal adviser. The conveyancer who, upon the purchase of a large estate, peruses a series of special stipulations, which have evidently been framed with reference to points which might be made matters of serious annoyance by a litigious, but are of little practical importance to the willing, purchaser, is naturally disposed to believe that no real difficulties exist where minor objections have been so carefully anticipated: and on the other hand, nothing is more common than to see conditions whose concise simplicity disarms the suspicion of the unprofessional reader, but whose sweeping clauses reduce counsel to the dilemma of either advising a client to complete under serious uncertainty whether he will acquire even a tolerably safe holding title, or of involving him in inquiries, which are almost sure to be heavily expensive, and may probably prove wholly unsatisfactory. The writer may also be allowed to add, as the result of a somewhat wide experience, that, in his opinion, the number of seriously defective and dangerous titles which at the present day are brought into market and passed off upon purchasers under the cover of special conditions of sale, is much larger than is commonly supposed.

CHAPTER V.

Chapter V.

AS TO THE SALE AND MATTERS CONNECTED THEREWITH.

1. *Auction, what it is.*
2. *Auctioneer, his liabilities, power, and remuneration.*
3. *Agent, his liabilities, power, and remuneration.*
4. *The deposit.*
5. *As to puffings and reserved biddings on a sale by auction.*

(1). AN auction, in the widest sense of the term, is any mode of sale, however conducted, in which the vendor comes under an express or implied obligation to part with the property to the highest bidder: a general direction to sell by auction, would, however, it is conceived, only authorize a sale by auction in the usual mode.

Section 1.

Auction;
what it is.Direction to
sell by.(2.) *As to the Auctioneer, &c.*

Section 2.

An auctioneer selling without sufficient authority (a), or not disclosing the name of his principal, is liable to the purchaser for his costs, and interest on his purchase-money if lying idle (b): and it has been held that if he sell, without at the time of sale disclosing the name of his principal, he is personally liable in damages for nonperformance of the contract (c).

As to the
Auctioneer,
&c.Auctioneer,
when per-
sonally liable.

The fact of his being, unknown to the purchaser, the May be him-

(a) As to acts by the vendor binding him to the sale, see *Pike v. Wilson*, 1 Jur. N. S. 59.

(b) *Brett v. Ellis*, and *Jones v. Dyke*, Sug. App. 813. See *Gaby v.*

Driver, 2 Y. & J. 355.

(c) *Hanson v. Roberdean*, Pea. N. P. C. 120; *Franklyn v. Lamond*, 4 C. B. 687; *Ex parte Hartop*, 12 Ves. 352; Sug. 42.

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self the
vendor.

Cannot vary
terms after
sale.

Rights and
liabilities of
in respect to
deposit and
purchase-
money.

Holds the
deposit as a
stakeholder.

owner of the property, seems to form no objection to the validity of the contract (*d*).

The auctioneer cannot, without express authority, delegate the sale to another (*e*); nor can he, after the sale, vary the terms of the contract (*f*): whether without express authority he can bind the vendor by special conditions of sale, seems to be doubtful (*g*). Where he professes to sell as "without reserve," it has been held at Law, that if he accepts a bid from the vendor, he commits a breach of contract with the purchaser, for which he may be made liable in damages (*h*).

Unless especially authorized, he has no power to receive more than the deposit (*i*): and if, as respects the deposit or any other part of the purchase-money which he is authorized to receive, he allow the purchaser to retain it on his personal or any other security, he does so at his own risk (*k*); nor where he is authorized to receive payment, is he justified in taking a bill of exchange instead of cash (*l*); but if he accepts the purchaser's I O U for the money, even though he does so with the vendor's consent, it seems that he may sue upon it in his own name (*m*). On a sale of goods he may recover the entire price from the purchaser (*n*).

Until the purchase is completed he is a stakeholder of the deposit, and should not part with it except by consent of both vendor and purchaser (*o*); if both claim it, he may file

(*d*) *Flint v. Woodin*, 9 Ha. 618.

(*e*) *Cockran v. Irlam*, 2 Mau. & S. 301; *Cullin v. Bell*, 4 Camp. 183; *Schmaling v. Thomlinson*, 6 Taunt. 147; see 9 Ves. 251; *Henderson v. Barnewall*, 1 Y. & J. 387; Sug. 44.

(*f*) See *Blackburn v. Scholcs*, 2 Camp. 343.

(*g*) *Pike v. Wilson*, 1 Jur. N. S. 59.

(*h*) *Warlow v. Harrison*, 6 Jur. N. S. 60, Exch. Ch.; and compare *Mainprice v. Westley*, 11 Jur. N. S. 975.

(*i*) *Sykes v. Giles*, 5 M. & W. 645.

(*k*) *Williams v. Millington*, 1 H. Bl.

81, 85; *Wiltshire v. Sims*, 1 Camp. 258; Sug. 48.*

(*l*) *Sykes v. Giles*, 5 M. & W. 645; *Williams v. Evans*, L. R. 1 Q. B. 352.

(*m*) *Cleave v. Moora*, 3 Jur. N. S. 48.

(*n*) *Williams v. Millington*, 1 H. Bl. 81; *Robinson v. Rutter*, 3 C. & R. 1195; 4 El. & B. 954.

(*o*) See *Smith v. Jackson*, 1 Madd. 620; *Burrough v. Skinner*, 5 Burr. 2639; and *Wiggins v. Lord*, 4 Beav. 30, where the deposit was received by the vendor's solicitor; but see *Edgell v. Day*, L. R. 1 C. P. 80, where

a bill of interpleader (*p*); but, in so doing, he must not claim to retain his commission out of it (*q*), nor must the amount held by him form a question in dispute (*r*); if, however, he be made a defendant to a bill for specific performance, and the deposit be brought into Court, he will be allowed to deduct his charges and expenses, subject to the question as to who shall ultimately bear them (*s*). If the contract be rescinded by the purchaser on the ground of fraudulent misrepresentations made by the vendor to the auctioneer, and innocently communicated by the latter, the fraud will be a good defence to an action by the vendor against the auctioneer for the deposit or purchase-money (*t*). If the estate be re-sold by the vendor, upon the alleged default of the first purchaser, the auctioneer receiving the deposits on both sales cannot in one suit get rid of the conflicting claims of the vendor and two purchasers (*u*). In such a case he should pay the money into Court under the Trustee Relief Act, and would be allowed his necessary costs of doing so.

At Law, the costs of an auctioneer who has paid the deposit into Court under an interpleader order (*x*), have been allowed out of the deposit; leaving the purchaser to his remedy over against the vendor, although known to be insolvent (*y*): but in a modern case the Court refused the interpleader order, unless the auctioneer gave security for costs, and declined to allow him the costs of the application (*z*).

Whether
allowed costs
out of, at Law.

the vendor's solicitor receiving the deposit was held not to be a stakeholder.

(*p*) *Fairbrother v. Prattent*, Dan. 64; Dan. Ch. Pr. 4th Ed. p. 148. If an action has been brought to recover the deposit, he may, it is conceived, take out an interpleader summons under 1 & 2 Will. 4, c. 58; See 23 & 24 Vict. c. 126.

(*q*) *Mitchell v. Hayne*, 2 Sm. & S. 63; and see *Bignold v. Audland*, 11 Sim. 28.

(*r*) *Diplock v. Hammond*, 2 Sm. &

G. 141; and see *Watts v. Hammond*, 3 Eq. R. 641.

(*s*) *Annesley v. Muggridge*, 1 Madd. 593; *Yates v. Farebrother*, 4 Madd. 239.

(*t*) See *Murray v. Mann*, 2 Exch. 538; *Stevens v. Legh*, 2 C. L. R. 251.

(*u*) *Hoggart v. Cutts*, Cr. & Ph. 197.

(*x*) Under the 1 & 2 Will. 4, c. 58.

(*y*) *Pitchers v. Edney*, 4 Bing. N. C. 721; and see *Reeves v. Barraud*, 7 Sc. 281.

(*z*) *Deller v. Prickett*, 15 Q. B. 1081.

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Rights of &c.,
as to deposit
after com-
pletion.

After the purchase is completed, or before, with the consent of the purchaser, the auctioneer may, except in very special cases (a), safely pay the deposit to the vendor, although in embarrassed circumstances (b): if the purchase go off, or the vendor fail to make a title (c), the purchaser may, and perhaps without giving notice of default (d), recover the deposit from the auctioneer in an action at Law (e); but he cannot, nor can the vendor, claim interest, although the auctioneer may actually have made a profit upon it, and been required by one only of the parties to invest it (f).

Commission.

The amount of his remuneration, unless (as it should be) settled by agreement (g), seems to depend upon custom (h): and even in the trade there appears to be no settled rate of commission. In a late case (i) the usual charge was by several auctioneers stated to be £5 per cent. up to the first £500 of purchase-money; by others, up to the first £1000; and by most of the witnesses, up to the first £2000, with £2 10s. per cent. on the remainder. An agreement that the auctioneer shall receive nothing if there be no sale, will not deprive him of his commission, if, after he has taken the usual steps preparatory to a sale, the estate be sold by the owner by private contract (k): but where an agent was to receive £100 for commission, "one-third down and the remaining two-thirds when the abstract of conveyance is drawn out," and an abstract of title was delivered, but the contract then went off, he was not allowed to recover from his principal the two-thirds which remained unpaid (l).

(a) See *Crosskey v. Mills*, 1 Cro. M. & R. 298, 302.

(b) *White v. Bartlett*, 9 Bing. 378.

(c) *Gray v. Gutteridge*, 1 Man. & R. 614; *Edwards v. Hodding*, 5 Taunt. 515.

(d) *Gray v. Gutteridge*, *ubi sup.*; *Dunston v. Cate*, 2 M. & W. 244.

(e) *Dyrraugh v. Skinner*, 5 Burr. 2639; *Mahony v. Robins*, 5 Taunt. 615; *Johannes v. Roberts*, 24 L. T. 254.

(f) *Harrington v. Hoggart*, 1 B. & Ad. 577; *Lord Salisbury v. Wilkinson*, cited 3 Ves. 48; 3 Bro. C. C. 44; *Broome v. Southouse*, *ibid.* 107; and see *Gaby v. Driver*, 2 Y. & J. 639.

(g) *Re Page*, 32 Beav. 457.

(h) See *Mallory v. Christie*, 1 Esq. 340.

(i) *Re Page*, *ubi sup.*

(k) *Raine v. Vernon*, 9 Car. & P. 559; *Driver v. Cholmondeley*, *ibid.*, n.

(l) *Alder v. Boyle*, 4 C. B. 685.

Where a solicitor employed an auctioneer to sell his client's property who retained out of the deposit, for his commission, more than would be allowed under the Bankruptcy scale (*m*), the solicitor was nevertheless allowed the whole charge on the taxation of his bill (*n*).

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And the auctioneer's (or agent's) claim to remuneration will be defeated by any negligence on his part, as to the mode of conducting the sale or otherwise, whereby the sale is defeated (*o*): and if he negligently misdescribe the property, he will be liable to repay to the vendor the amount claimable by the purchaser in respect of such misdescription (*p*); and he may be liable in nominal damages for breach of duty, though no actual loss may have been sustained (*q*). An executor or trustee (*r*) or mortgagee with power of sale (*s*), acting as auctioneer in the sale of the trust or mortgaged property, cannot charge commission, unless it can be collected from the trust instrument or mortgage that such was the intention (*t*).

Claim to,
defeated by
negligence.

Trustee, &c.,
cannot claim
commission.

As a general rule, any loss occasioned by his insolvency or *malu fides* falls on the vendor as his employer (*u*); and a mortgagee, adopting his mortgagor's contract for sale, adopts also this liability, as between himself and the purchaser (*x*): but a fiduciary vendor will not be personally responsible to his *cestuis que trust* for such loss, if he have acted prudently and under proper advice in the matter (*y*).

Insolvent—
loss falls on
vendor.

By the appointment of an auctioneer the vendor impliedly authorizes the auctioneer or his clerk (*z*) to bind him by their

Is agent for
both parties
within the

(*m*) See Bankruptcy General Orders, Jo. 148.

19 May, 1855, Sched.

(*n*) *Re Page*, *ubi supra*.

(*o*) *Dence v. Daverell*, 3 Camp. 451; *Jones v. Nanney*, 13 Pri. 76.

(*p*) *Parker v. Farebrother*, 1 C. L. R. 323.

(*q*) *Hibbert v. Bayley*, 2 Fost. & Fin. 48.

(*r*) *Kirkman v. Booth*, 11 Beav. 273.

(*s*) *Mathison v. Clarke*, 3 Dro. 3.

(*t*) *Douglas v. Archbutt*, 2 De G. &

(*u*) See and consider *Sanderson v. Walker*, 13 Ves. 601, 602; *Fenton v. Browne*, 14 Ves. 144, 150; *Annesley v. Muggridge*, 1 Madd. 593, 596; *Smith v. Jackson*, 1 Madd. 618, 620; Sug. 52.

(*x*) *Rowe v. May*, 18 Beav. 613.

(*y*) *Edmonds v. Peake*, 7 Beav. 239.

(*z*) *Bird v. Boulter*, 1 Nev. & M.

313; *Bartlett v. Purnell*, 4 Ad. & E. 792; *Henderson v. Barnwall*, 1 Y. &

J 387.

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Statute of
Frauds.

Revocation
of his author-
ity.

signatures as his agent within the Statute of Frauds (a); a similar authority is given by the bidder, by the act of bidding (b), although it be by an agent (c). Before the fall of the hammer, either party may revoke the authority (d); but not after the property has been knocked down, even though no contract may have been signed (e). Whether an action would lie for such revocation is doubtful.

Selling by
private con-
tract at the
reserved price.

Where property was offered for sale by auction under order of the Court, and was bought in, but before the auctioneer had left the room a person, to whom he had communicated the reserved price, signed a contract for the purchase at that price, it was held that the auctioneer had not exceeded his authority, and the contract was enforced (f).

Revocation
of his author-
ity.

Where the auctioneer's authority has been revoked by the vendor before the sale, such revocation is valid even as against parties purchasing in ignorance of it (g), but not where the auctioneer has a written authority, and the bids are made upon the faith of it.

His right to
sue party
for whom he
signs as
agent.

It seems to be doubtful whether the auctioneer can sue a party for whom he personally signs as agent (h); but he can maintain the action when the entry has been made by his clerk on behalf of the defendant (i).

Section 3.

As to agents.
Agent.

(3). As to agents.

An agent, either for purchase (k) or sale (l) of an estate

(a) *Emmerson v. Heelis*, 2 Taunt. 38; *Kenworthy v. Schofield*, 2 B. & C. 445; *Kemeys v. Proctor*, 1 Jac. & W. 350.

(b) See Sug. 43.

(c) *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 207.

(d) See *Blagden v. Bradbear*, 12 Ven. 466; *Mason v. Armitage*, 13 Ven. 25; *Malins v. Freeman*, 2 Ke. 25; *Baglin v. Florence*, 10 C. B. 744; *Infra*, p. 188.

(e) *Day v. Wells*, 7 Jur. N. S. 1004; 30 Beav. 220.

(f) *Elze v. Barnard*, 28 Beav. 280.

(g) *Manser v. Back*, 6 Ha. 443.

(h) *Forebrother v. Simmons*, 5 B. & Ald. 333; *Wright v. Dannah*, 2 Camp. 208.

(i) *Bird v. Boulter*, 1 N. & M. 313; *Graham v. Musson*, 5 Bing. N. C. 602, 608.

(k) Sug. 145.

(l) Sug. 146.

may be appointed by word of mouth (*m*); but a verbal appointment, of course, is generally inexpedient: neither of the contracting-parties can, it appears, act as agent for the other (*n*); nor can the seller's agent act as agent for the buyer, unless expressly authorized by the latter (*o*).

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How ap-
pointed.

Though not perhaps absolutely necessary (*p*), it is very desirable that the agent of a railway company or other corporation should be appointed under the corporate seal (*q*). The company may, by their conduct, adopt and ratify the act of an unauthorized agent; but in dealing with a public company, strict proof of the agent's authority should be required.

By a corpo-
ration.

Where the agent has a written authority, parties dealing with him upon the faith of it are unaffected by private restrictions imposed upon him by his principal, but of which they have no notice (*r*). Nor can a contract, when duly entered into by an agent, be avoided by his neglect to communicate it to his principal pursuant to the latter's instructions (*s*).

Private in-
structions to.

Wherever a general authority is given by a principal to an agent, this implies and includes a right to do all subordinate acts incident to and necessary for the execution of that authority,—and if notice is not given to the person with whom the agent deals that the principal has limited the authority, the principal is bound (*t*). But an estate agent instructed as to price has no implied authority to sign an open contract on behalf of his principal (*u*).

General
authority,
what it
includes.

(*m*) See 9 Ves. 250; *Dyas v. Cruise*, 2 J. & L. 460.

(*n*) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. 333.

(*o*) *Durrell v. Evans*, 7 Jur. N. S. 585.

(*p*) See *Wilson v. West Hartlepool R. Co.*, 2 De G. Jo. & S.; and L. J. Turner's remarks on sec. 97 of 8 & 9 Vict. c. 16, *ib.* 496; and see 5 H. L. Ca. 363, 364, and Sug. 77. See as to contracts by trustees of a charity who have been incorporated, 35 & 36 Vict.

c. 24 sect. 11.

(*q*) *Corp. of Ludlow v. Charlton*, 6 M. & W. 815; *Cope v. Thames Haven Co.*, 3 Exch. 841; 6 Rail. Ca. 83; *Diggle v. London and Blackwall R. Co.*, 5 Exch. 442; *Goody v. Colchester R. Co.*, 17 Beav. 132.

(*r*) *Neeld v. Duke of Beaufort*, 5 Jur. 1123; see as to restrictions on an auctioneer, *Manley v. Back*, 6 Ha. 443.

(*s*) *Wright v. Bigg*, 15 Beav. 592.

(*t*) Per M. R. in *Colten v. Gardner*, 21 Beav. 542.

(*u*) *Hamer v. Sharp*, L. R. 19 Eq. 108.

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Apparent
agent.

Also a person may so deal with third parties, as to warrant them in the belief that another is his agent; and he will, at least in Equity, be bound by any unauthorized agreement of the agent, which he (the principal) has given them reason to consider authorized (v).

For purchaser,
how far he
can bind his
principal.

An agent, employed to bid for an estate, and not limited as to price, can bind his principal to any amount; if, being limited, he exceed the limit, and his want of authority be unknown to the other party, he himself is bound (x), and his principal is said to be free (y); upon the general ground that he cannot bind his principal beyond the extent of his authority (z): but the production of written instructions authorizing him to give a specified price, does not preclude parol evidence of his having had a general discretionary power (a).

Agency, if
denied, may
be established.

As between the vendor and an alleged agent for purchase, but whose authority is denied, the agent has all the rights and liabilities of a principal: the fact of agency, if denied, may, of course, if practicable, be established, by the agent against the principal, the principal against the agent (b), or by the vendor or purchaser against the other principal (c).

Contract by
agent assum-
ing to be

There is not, as a general rule, any objection to a contract for purchase entered into in the name of an agent,

(v) See *Smith v. East India Co.*, 16 Sim. 76.

(x) See *Jones v. Downman*, 4 Q. B. 235, n.

(y) *Hicks v. Hankin*, 4 Esp. 114; *East India Co. v. Hensley*, 1 Esp. 112; *Amb.* 498; 10 Ves. 400; *Sug.* 47. *Quere*, however, whether the rule should not be, that where the agent exceeds the limit, the principal shall be bound to the extent of such limit; provided, in the case of an auction, that it exceed the amount of the last adverse bidding.

(z) See *Osling & Smith*, 16 Jur.

497, Q. B.

(a) *Hicks v. Hankin*, 4 Esp.; see p. 116

(b) *Taylor v. Salmon*, 4 Myl. & C. 184; *Dale v. Hamilton*, 2 Ph. 266; *Lees v. Nuttall*, 1 Buss. & M. 53, *affd.* 2 Myl. & K. 819; and see *Austin v. Chambers*, 6 Ol. & F. 1.

(c) See *Marston v. Roe*, 8 Ad. & E. 14; *infra*, s. 4; and *Field v. Boland*, 1 Dru. & Wal. 37; *Wilson v. Hart*, 7 Taunt. 295; *vide infra*, Ch. XVII., as to when an action must be brought in the agent's name.

Chap. V.
Sect. 3.principal
enforced.By nominal
agent, when
enforced.

upon the ground of his having professed to deal on his own account (*d*); but in the converse case of a purchaser professing to contract as agent for another, Equity would refuse specific performance against the vendor, if it appeared that the name of the assumed principal was used as an inducement to a bargain, which would not otherwise have been entered into (*e*). Of course the real principal is liable, although he may have assumed to contract as an agent;—no other principal being named (*f*).

Where on a sale of goods by auction, a bidder in reply to the auctioneer gave his own name as the purchaser, but did not disclose that he was acting merely as agent, or sign any written contract, and there was evidence that the vendor knew he was only an agent, and the goods were delivered to the principal, the Court of Exchequer were equally divided in opinion, as to whether the agent was liable to the vendor in an action for goods sold and delivered (*g*).

An agreement entered into by an attorney or agent, should, in order to avoid any question as to personal liability, be made and signed, by him, as attorney or agent, in the name of the principal (*h*); in fact, if a person by deed covenant for himself and his heirs for the acts of another, he is personally liable, although described as agent (*i*); it has, however, been held, that if a person enter into a contract in writing, not under seal, describing himself as agent and naming his principal, he is not personally liable, unless he had no authority to make the contract, or, in making it, exceeded his authority (*k*); but slight expressions, indicative of an intention to bind the agent, have been held to take a

Agreements
by agent, how
to be signed.Agent when
personally
liable.

(*d*) Sug. 48: *Nelthorpe v. Holgate*, 1 Coll. 203; *Trent v. Hunt*, 9 Exch. 14; *Saxon v. Blake*, 29 Beav. 488.

(*e*) *Phillips v. Duke of Bucks*, 1 Vern. 227; *infra*, Chap. XVIII. s. 9.

(*f*) *Carr v. Jackson*, 21 L. J. Exch. 137.

(*g*) *Williamson v. Barton*, 2 Fost. & Fin. 544; 8 Jur. N. S. 341.

(*h*) See *Gray v. Gutteridge*, 1 Man. & R. 614, 618; *Humble v. Hunter*, 12 Q. B. 310; *Magee v. Atkinson*, 2 M. & W. 440; *et vide infra*, Ch. XVII; Sug. 57.

(*i*) See *Appleton v. Binks*, 5 East 148; Sug. 57.

(*k*) *Downman v. Jones* (*in error*), 9 Jur. 554, Ex. Ch.

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case out of the general rule, where the signature is in the name of the agent—although so described—and there is no ratification by the principal (*l*): even where a person, without authority, signs an instrument in the name of and as agent for another, he cannot be treated as a party to such instrument, and be sued upon it, unless he be shown to have been really the principal; although he may probably be liable in an action for damages for the misrepresentation (*m*): where the agent of the vendor, at the purchaser's request, signed the agreement in his (the agent's) own name, this was held not to be a sufficient agreement in writing under the Statute of Frauds, the vendor failing to prove that his agent signed as agent for the purchaser (*n*); so, where the seller's agent, in the presence of both the buyer and the seller, wrote out a sale note, containing the names of the parties, and, at the buyer's request, altered the date so as to give him longer credit, it was held that the buyer was not bound (*o*).

Powers of
agent.

After the contract is entered into, an agent for sale, if and so long as his principal is undisclosed, may, within the limits of his original authority, vary the terms of payment (*p*): he cannot, without special authority, receive the purchase-money (*q*); if authorized to receive it, a direction from his principal to pay it to a third party cannot, if given for valuable consideration (*r*), be revoked without the consent of such third party. He is not bound to pay over to his principal money received under a contract which has been rescinded on the ground of fraud (*s*).

(*l*) *Tanner v. Christian*, 4 El. & B. 96; and distinguished *Spittle v. Lavender*, 2 Bro. & B. 452, where the agreement was ratified by the principal. See too *Reid v. Draper*, 7 Jur. N. S. 1125, a contract between brokers.

(*m*) *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 16 Jur. 1041.

(*n*) *Graham v. Munson*, 5 Bist. N. C. 608.

(*o*) *Durrell v. Evans*, 7 Jur. N. S. N. 535.

(*p*) Sug. 46, 47, *Blackburn v.*

Scholes, 2 Camp. 343.

(*q*) *Mynn v. Joliffe*, 1 Moo. & R. 326; *Pole v. Leask*, 28 Beav. 562; and see further, *infra*, Ch. XIII., as to payment to agents.

(*r*) *Metcalf v. Clough*, 2 Man. & R. 178; *Yates v. Hoppe*, 9 C. B. 341; see in Equity, *Rodick v. Gendell*, 12 Beav. 325; 1 De G. M. & G. 763; *L'Estrange v. L'Estrange*, 13 Beav. 281; *Riccard v. Prichard*, 1 K. & J. 277.

(*s*) *Supra*, p. 179.

It was in a modern case decided in Scotland, that an agent contracting for a principal in insolvent circumstances, and failing to communicate the fact to the vendor, was personally responsible for his purchase-money: but on an appeal to the Lords the respondent's counsel deemed it useless to argue the point (t).

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If an agent for sale is to receive for commission a percentage on the sum obtained, he cannot claim it in respect of any part of the purchase-money which remains unpaid (u): unless such nonpayment be occasioned by the wilful act or default of the vendor (x): if several agents are employed, and one find, and another conclude, the bargain with a purchaser, each may claim a commission; but not the usual commission of 2l. per cent. (y).

Commission.

In a modern case (z), where an agent was employed to find a purchaser at a certain price, on which he was to have a specified per-centage if a sale were effected, and the agent found a purchaser, but the vendor refused to complete the sale, it was held that the agent could sue on a *quantum meruit* for the work and labour done; and that in such a case the law implies a promise on the part of the vendor to remunerate the agent, even if the contract should not be completed: but two of the judges carefully disclaimed any intention of laying it down as a general rule, that when an agent, is employed to sell, and his authority is revoked, he may resort to the common counts for remuneration for his services: the understanding being that he is to find a purchaser if he is to be entitled to his commission; and if he does not do so before his authority is revoked he is to receive nothing (a).

Whether
entitled to
remuneration
where sale not
effected.

In order to entitle himself to commission the agent must

Not entitled
to commission

(t) *Dudgeon v. Thompson*, 1 Macq. H. L. C. 714.

(u) *Bull v. Price*, 7 Bing. 327.

(x) *S. C.*, see p. 241; and *Cannon v. Kelly*, 1 Hay. & J. 655; and *Alder v. Boyle*, 4 C. B. 635.

(y) *Murray v. Currie*, 7 Car. & P. 584.

(z) *Prickett v. Badger*, 3 Jur. N. S. 66; 1 Com. Ben. N. S. 296.

(a) Per *Williams and Crowder, JJ.*, 3 Jur. N. S. 67; see and compare *Planche v. Colburn*, 8 Bing. 14; *De Bernardy v. Harding*, 8 Exch. 822.

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unless he acts
within his
authority.

strictly observe the letter of his authority. Thus, where A., the owner of certain pottery works, and B. the owner of a patented invention for earthenware, entered into an arrangement that if A. sold the works with the benefit of the patent annexed, he should be entitled to a specified remuneration, it was held that A. could not claim anything for effecting a sale of the works without the patent (b).

Authority
may be re-
voked at any
time before
agreement
concluded ;

The authority of an agent, either for sale or purchase, may be revoked at any time before he has entered into a binding agreement (c) ; and the revocation of his authority will not entitle him to claim the specific amount of remuneration, which had been agreed to be paid to him on a sale being effected : although it may entitle him at once to a *quantum meruit* for services actually rendered (d). If he act without authority, his alleged principal, even although he have had no previous communication with him, or were ignorant of his name at the date of the contract, may adopt his acts (e) : and mere acquiescence with knowledge of the fact, but without any overt act of adoption, may raise a presumption of assent, and make the contract binding on the alleged principal (f) ; nor is it necessary that the principal should have been competent to contract at the date of the agreement ; for instance, an administrator may adopt a contract entered into before the grant of the letters of administration (g) ; but a contract entered into by A., expressly as agent for B., cannot be adopted by C. (h).

or unauthor-
ized act
adopted :

only by
nominal
principal.

(b) *Pelly v. Sidney*, 5 Jur. N. S. 793.

(c) *Farmer v. Robinson*, 2 Camp. 339, n. ; *Blagden v. Bradburn*, 12 Ves. 466 ; *Mason v. Armitage*, 13 Ves. 25 ; *Manser v. Back*, 6 Ha. 443 ; *Smart v. Bassindale*, 3 C. B. 380 ; *supra*, p. 182.

(d) See *Campanari v. Woodburn*, 3 C. L. R. 140 ; 15 C. B. 400 ; *Simpson v. Lamb*, 4 W. R. 328. But see and consider *Prichard v. Badger*, 1 C. B. N. S. 298 ; 3 Jur. N. S. 66 ; and *vide supra*, p. 187.

(e) *Maclean v. Denny*, 4 Bing. 722 ;

Gosbell v. Archer, 2 Ad. & E. 507 ; and see *De Bell v. Thompson*, 3 Beav. 469 ; *London and Birmingham R. Co. v. Winter*, Cr. & Ph. 57 ; *Wilson v. Tummon*, 6 Sa. N. B. 894 ; and *Blackwood v. Borrowes*, 4 Dru. & W. 441, 472.

(f) *Bigg v. Strong*, 3 Stann. & G. 592 ; 4 Jur. N. S. 108, 938.

(g) *Foster v. Bates*, 12 M. & W. 226.

(h) *Wilson v. Tummon*, 6 Man. & G. 286 ; 4 Sa. N. B. 894.

The clerk of an agent for sale has, it appears, no implied authority to bind the principal (i).

Chap. V.
Sect. 3.

Clerk of agent
cannot bind
principal.
Land steward.

A land steward has no general authority to enter into contracts for leases for terms of years (k).

Where one of several purchasers entered into a secret arrangement with the vendors, that if a sale were effected at a stipulated price, he was to receive a bonus out of the purchase-money, and he persuaded his co-purchasers that the vendors would not consent to any reduction of the price, it was, of course, held, that the transaction could not stand (l).

Under-hand
bargain by
agent.

A contract by a corporation must necessarily be made either by writing under its common seal or by its officer or other agent authorized to make such contract, and the agent must make it in writing, if writing would be necessary were it the contract of an individual. The Lands C. Act, 1845, s. 97, and the C. Act, 1867, s. 37, contain with respect to contracts provisions which may be regarded as partially declaring rather than as altering the Law.

Contracts by
corporations.

There can, of course, be no doubt that a company may ratify under seal previous contract not under seal; and it is settled that they may, by their own conduct, as *e.g.*, by an act of part performance, bind themselves to a contract, which an unauthorized agent may have entered into on their behalf (m); but an agreement by the promoters of the company, prior to its incorporation, is not binding on the company, until it has been either ratified or adopted by them (n); and, after considerable conflict of authorities, it seems to be now well settled, that if the agreement, into

May ratify
and adopt a
contract not
under seal.

(i) *Coles v. Trecothick*, 9 Ves. 234;
Blore v. Sutton, 3 Mer. 237; and see
Bird v. Boulter, 4 B. & Ad. 446; and
Burnell v. Brown, 1 Jac. & W. 168.

(k) *Colleen v. Gardner*, 21 Beav. 540.

(l) *Beck v. Kantorewick*, 3 K. & Jo.
230.

(m) *Wilson v. West Hartlepool R.
Co.*, 2 De G. Jo. & S. 475; 34 Beav.
187.

(n) *Preston v. Liverpool E. Co.* 5
H. L. Ca. 605; *Williams v. St.
George's Harbour Co.*, 24 Beav. 339;
3 De G. & Jo. 547.

**Chap. V.
Sect. 3.**

which the promoters or directors of the company have entered, is not warranted by the terms of their incorporation, the company is not bound (o). A contract by the promoters for purchase, founded on the withdrawal of a landowner's opposition to the bill, has been enforced against the company; and, as a general rule, wherever the company have adopted, and had the benefit of a contract which is not *ultra vires*, and which, if entered into between ordinary individuals, would be valid, the contract may be enforced against them (p).

We may here refer to the Companies Seals Act, 1864 (q); under which a public company, formed under the Act of 1862, may have an official seal for use in foreign countries, and may employ a local agent to affix the same to any deed, contract, or other instrument to which the company is a party in such foreign country.

**Contracts by
trading cor-
porations.**

With reference to trading corporations, the result of the cases seems to be that whenever the contract is made for the purposes for which they were incorporated, it may be enforced, though not under seal (r).

(o) *Hawkes v. Eastern Counties R. Co.*, 5 H. L. Co. 331; *Bargate v. Shortridge*, 2 Macq. 420.

(p) *Lowe v. London and N. W. R. Co.*, 18 Q. B. 632; and see generally as to railway companies being bound by their adoption of contracts entered into in anticipation of their powers to purchase, or of their Acts of incorporation, and as to the validity of contracts for purchase founded on the withdrawal of parliamentary opposition, *Edwards v. Grand Junction R. Co.*, 1 Myl. & C. 650; *Stanley v. Chester, &c. R. Co.*, 3 Myl. & C. 773; *Preston v. Liverpool, &c. R. Co.*, 5 H. L. Co. 605; *Webb v. Direct London, &c. R. Co.*, 1 De G. M. & G. 521;

Hawkes v. Eastern Counties R. Co., 1 De G. M. & G. 737; 5 H. L. Co. 331; *Stuart v. N. W. R. Co.*, 1 De G. M. & G. 721; *Cooday v. Colchester R. Co.*, 17 Beav. 132; *Shrewsbury and Birm. R. Co. v. N. W. R. Co.*, 16 Jur. 311 Q. B.; 6 H. L. Co. 112; *Lanc. and Carl. R. Co. v. L. N. W. R. Co.*, 2 K. & Jo. 293; *Earl of Shrewsbury v. N. Staffords. R. Co.*, L. R. 1 Eq. 593; See Sugd. 75. *Lindley Partners*: 1, 355.

(q) 27 & 28 Vict. c. 19.

(r) *Henderson v. Australian Royal Mail, &c. Co.*, 5 E. & B. 409; and see *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463, affd. L. R. 4 C. P. 617, and the cases there cited.

(4.) *As to the deposit (s).*

The deposit is a payment by anticipation of part of the purchase-money (*t*); and the purchaser cannot elect to forfeit it and avoid the agreement (*u*).

Chap. V.
Sect. 4.

As to the
deposit.
Deposit is a
part payment.

Even the deposit should not be paid to a mere agent for sale, without express authority from the vendor. If the authority be for the agent to receive it at a particular time, or in a particular manner, of course it cannot be safely paid, except to, or by the direction of, the vendor, at any other time, or in any other manner (*x*); and the purchaser, will not be liable for loss arising from his having followed any such special authority as to the mode of payment (*y*).

Payment of.

If the vendor's solicitor receives the deposit he holds it as agent for the vendor, and not as stakeholder for both parties (*z*).

Vendor's
solicitor
receives it as
his agent, and
not as stake-
holder.

The deposit cannot safely be paid by the purchaser, by being set off in account with the auctioneer or agent, except under the special circumstances of his being able to show the existence of a debt of equal amount due from the vendor to the auctioneer or agent, and that the latter was authorized by the vendor to retain the deposit on account of such debt (*a*); so, if, instead of making a cash payment, the purchaser give his acceptance, payment of the bill when due is no defence to an action by the vendor, if the bill never came into his possession (*b*); so a cheque, if given for the deposit, should be capable of being immediately cashed, and should not include other moneys (*c*).

Not generally
by settlement
of accounts
with agent;

nor by the
purchaser's
bill.

(s) *Et vide supra*, sect. 2.

(t) *Palmer v. Temple*, 9 Ad. & E. 508, 520; Sug. 50.

(u) 2 Mer. 506; and see 9 Ad. & E. 520.

(x) See *Young v. Guy*, 8 Beav. 149.

(y) *Warwick v. Noakes*, 1 Pea. 98; *Hawkins v. Rutt*, *ibid.* 248; *Eyles v. Ellis*, 4 Bing. 112; Sug. 49.

(z) *Edgell v. Day*, L. R. 1 Q. C. P. 80.

(a) *Barker v. Greenwood*, 2 Y. &

C. 414; *Young v. White*, 7 Beav. 506; *Hanley v. Cassan*, 11 Jur. 1088; *Sweeting v. Pearce*, 7 Jur. N. S. Exch. 800; 9 C. B. N. S. 534; *Bridges v. Garrett*, L. R. 4 C. P. 580; see this case on appeal, L. R. 5 C. P. 451.

(b) *Sykes v. Giles*, 5 M. & W. 645; *Williams v. Evans*, L. R. 1 Q. B. 352.

(c) *Bridges v. Garrett*, L. R. 4 C. P. 580; L. R. 5 C. P. 451.

Chapter V.
THE PURCHASER'S
RIGHTS

If a cheque be given for the deposit, an action on the cheque may be resisted upon any ground which would have enabled the purchaser to recover at Law the deposit if actually paid (*d*).

**Investment of,
when binding
on purchaser
or vendor.**

If a purchaser become entitled to a return of his deposit, he can, in the absence of special agreement, claim the specific sum paid, with interest; and will not be prejudiced or advantaged by any fall or rise in any securities in which it may have been invested (*e*); unless such investment were made with his assent (*f*), (which will not be assumed from his making no reply to notice of the investment,) (*g*) or, (in the case of a bill being filed for specific performance), under the authority of the Court, in which cases the investment will be at his risk and for his benefit (*h*): and the same rules apply to an investment of the purchase-money by the purchaser, pending discussions as to title, &c.; and also apply conversely, for and against the vendor, in cases where, by the purchase being completed, he becomes entitled to the purchase-money (*i*).

**When no
enforceable
contract, the
deposit must
be returned;**

**unless there
be a provision
for its for-
feiture.**

Where there is no contract, or no contract which can be enforced, the purchaser is entitled to have his deposit returned (*k*): but where there is a valid contract, which the purchaser refuses to perform, and which contains a clear stipulation that, in the event of breach, the deposit is to be forfeited, the vendor may retain it if paid, or may enforce any security (*e.g.*, an I O U) which he holds for it, and this without reference to the amount of damage actually sustained (*l*).

(*d*) *Mills v. Oddy*, 6 Car. & P. 728.

(*e*) *Doyle v. Potts*, 3 Bro. C. C. 22; *Poole v. Rudd*, 3 Bro. C. C. 49; *Burroughes v. Browne*, 9 Ha. 609.

(*f*) See *Paul v. Birmingham*, 11 Hare, 1177; 11 Hare, 205.

(*g*) *Massy*, 13 Ves. 244; *Gasford*, 2 Madd. 161.

(*h*) *Paul v. Rudd*, 3 Bro. C. C. 50.

(*i*) See *Burroughes v. Browne*, 9 Ha. 609.

(*k*) *James v. Roberts*, 31 Beav. 618; 6 Jur. N. S. 1199. See *Batts v. Batts*, 4 H. & N. 608.

(*l*) *Hinton v. Sparks*, L. R. 3 C. P. 161.

Equity will, in general, relieve the purchaser against forfeiture of his deposit, if he be able and willing to give to the vendor the full benefit of the contract (*m*): its return, with interest, may be directed even in a suit for specific performance, where the bill is dismissed, if the vendor be plaintiff (*n*); so, also, in a suit by the purchaser for rescission of the contract, on the ground of misrepresentation or the like (*o*). But, according to the practice which has hitherto prevailed, the return of the deposit will not be ordered in a suit for specific performance, where the purchaser is plaintiff and the bill is dismissed (*p*); nor where the vendor is plaintiff, if the bill is dismissed without any decision upon the question of title, but for *laches*, or on some other collateral ground (*q*). It is conceived, however, that when the Judicature Act, 1873, comes into force, the technical rule which has prevented a Court of Equity from directing the return of the deposit where the purchaser fails in his suit for specific performance, viz, that the granting of any relief is inconsistent with the dismissal of the bill, will no longer operate, and that the Court will have jurisdiction in any action, whether for the specific performance or the rescission of the contract, to direct a return of the deposit, where the purchaser would have been entitled to recover it at Law (*r*). If no title be shown the purchaser has a lien on the estate for the amount of the deposit (*s*), and also for his costs of suit (*t*); so, also, if the contract be rescinded for misrepresentation or the like (*u*).

Chap. V.
Sect. 4.

Forfeiture of,
which relieved
against.

Lien for.

If the purchaser die before obtaining a conveyance, in-

Death of
purchaser.

(*m*) *Vernon v. Stephens*, 2 P. Wms. 66; *Moss v. Matthews*, 3 Ves. 279; Sug. 55.; *Webb v. Kirby*, 7 De G. M. & G. 136.

(*n*) *Butler v. Lord Portarlington*, 1 Dru. & W. 65; *Graves v. Wright*, 2 Dru. & W. 79; *infra*, Ch. XVIII. s. 10.

(*o*) *Torrance v. Bolton*, L. R. 14 Eq. 124; *affd.* L. R. 8 Ch. ap. 118.

(*p*) *Bennet College v. Cury*, 8 Bro. C. C. 390; see *Williams v. Edwards*, 2 Sim. 78; also *Geo v. Pearce*, 2 De

G. & S. 325.

(*q*) *Southcomb v. Bishop of Exeter*, 6 Ha. 225, 228.

(*r*) See 33 & 37 Vict., c. 66, sect. 24.

(*s*) *Wythes v. Lee*, 2 Jur. N. S. 7; *infra*, Ch. X. s. 3; 3 Drew. 396.

(*t*) *Middleton v. Magway*, 2 H. & M. 233; *Hindley v. Emery*, 11 Jur. N. S. 874; *Turner v. Marriott*, L. R. 3 Eq. 744.

(*u*) *Torrance v. Bolton*, L. R. 14 Eq. 124; L. R. 8 Ch. Ap. 118.

testate and without an heir, it seems probable that the vendor might retain both the estate and the deposit.

Insolvency of auctioneer.

As a general rule, if the deposit be lost through the insolvency of the auctioneer, the loss falls on the vendor (*x*); but fiduciary vendors, if they have used due diligence, will not be personally liable to their *cestuis que trust* (*y*).

Return of in bankruptcy.

The Court has, on petition, ordered the return of a deposit paid by a purchaser under a fiat in Bankruptcy, which was subsequently superseded (*z*).

Lunatic purchaser.

Upon a purchase by a lunatic, the vendor cannot be required to refund the deposit, unless he contracted with notice of the lunacy (*u*).

Tenant for life not entitled to forfeited deposit.

Where trustees, pursuant to the usual power, contracted with the consent of the tenant for life, to sell, and a large deposit was paid to the latter, and then the purchaser failed to complete, it was held that the forfeited deposit did not belong to the tenant for life, but must be treated as purchase-money on an actual sale under the power (*b*).

Section 5.

As to puffers and reserved biddings.

The rule at Law as to employment of a puffer.

(5) *As to puffers and reserved biddings.*

Prior to the recent statute of the 30 & 31 Vict. c. 48, it had become well settled at Law that, in the absence of a stipulation expressly reserving the vendor's right to bid, the employment of a single puffer would of itself vitiate the sale, even though it was not advertised as without reserve (*c*).

(*x*) *Supra*, sct. 2.

(*y*) *Edwards v. Peake*, 7 Beav. 239.

(*z*) *Ex Parte Fector*, Buck, 428.

(*a*) *Beavan v. M'Donnell*, 9 Exch. 309. As to *Frost v. Beavan*, 17 Jur. 369, *vide supra*, p. 7, n. (*u*).

(*b*) *Shrewsbury v. Shrewsbury*, 18 Jur. 397.

(*c*) See remarks of Lord Cranworth, in *Mortimer v. Bull* (*ubi supra*), who states the rule as well established; *Warton v. Harrison*, 3 Jur. N. S. 66.

Mainprice v. Westley, 11 Jur. N. S. 975; *Green v. Baverstock*, 10 Jur. N. S. 1047; and see, too, *Thorntott v. Haines*, 15 M. & W., see pp. 371, 372; and see *Wheeler v. Collier*, 1 Moo. & M. 123; *Crowder v. Anson*, 3 Bing. 253; *See v. Mors*, 3 Y. & J. 351, where the puffer was employed by the vendor. See now *Gilliat v. Goss*, L. R. 9 Eq. 60, and *supra*, p. 113.

In Equity, however, it was the generally received doctrine that unless the property were expressly or impliedly offered for sale without reserve (*d*), the employment of a bidder to prevent its going at an undervalue was allowable (*e*); but the rule did not extend to authorize the employment of more bidders than one, even although they were limited to the same sum (*f*); nor even of a single bidder for the purpose of enhancing the price indefinitely (*g*); but, on a sale in lots, several bidders might, it is conceived, have been employed for different parts of the property, provided that no lot were protected by more than one bidder: nor was it material that the person employed to bid and the purchaser were the only bidders (*h*).

Chap. V.
Sect. 5.

Puffers.
Rule as to
in Equity.

Equity had, in fact, favoured the employment of a person to protect the property: for it had refused to enforce specific performance against a vendor, in the several cases of a person generally known as his agent having bid for the purchaser and been mistaken for a puffer (*i*), and of the person actually employed to bid for the vendor having neglected so to do (*k*): so, in a converse case, where, upon a sale of estates belonging to several vendors, the person employed to protect one estate, by mistake purchased another, the bill against him for specific performance was dismissed (*l*).

Purchasing by
mistake,
specific per-
formance not
enforced
against.

The soundness of the general rule in Equity was however questioned by Lord Cranworth in the case of *Mortimer v. Bell* (*m*); and now by the 30 & 31 Vict. c. 48, the rule which must for the future obtain in Equity has been conformed to that which was already well established at Law. In every case the particular or conditions of sale must state

"Sale of Land
by Auction
Act, 1867."

(*d*) *Meadows v. Tanner*, 5 Madd. 34; *Robinson v. Wall*, 2 Ph. 372; and see *Thornett v. Haines*, 15 M. & W. 367.

(*e*) *Woodward v. Miller*, 2 Coll. 279, where the earlier cases are cited; *Flint v. Woodin*, 9 Ha. 618.

(*f*) *Wheeler v. Collier*, 1 Moo. and M. 123; and see 15 M. and W. 372; and Sug. 10.

(*g*) 12 Ves. 483.

(*h*) *Oldfield v. Round*, 5 Ves. 209.

(*i*) *Twining v. Morrice*, 2 Bro. C. C. 326.

(*k*) *Mason v. A. mitage*, 13 Ves. 25.

(*l*) *Malins v. Freeman*, 2 Ke. 25; and see *Swaisland v. Dearsley*, 29 Beav. 430.

(*m*) L. R. 1 Ch. Ap. 10.

whether the land is sold without reserve, or subject to a reserved price, or whether the right to bid is reserved; and if it is stated that the sale is without reserve, or to that effect, it is made unlawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly a bidding from any such person. Where it is declared either in the particular or conditions that the sale is subject to a right for the seller to bid, it is made lawful for the seller, or any one person on his behalf, to bid at such auction, in such manner as he may think proper. Prior to this statute, the employment of a puffer where the sale was "without reserve," was as invalid in Equity as it was at Law; nor did it need the aid of a legislature to enable a vendor, by whom a right of bidding is reserved, to bid by himself or a single agent. By the 1st section it is provided, that whenever a sale by auction of land would be invalid at Law by reason of the employment of a puffer, the same shall be deemed invalid in Equity, as well as at law; but the statute has failed to meet in express terms the precise point at issue in the practice at Law and in Equity, viz., whether, where the sale is not expressly stated to be "without reserve," and a right to bid is not expressly reserved by the vendor, or notified to the purchaser, the employment of a single bidder, to prevent a sale at an undervalue, is allowable. There can, however, be no doubt, that in such a case, the rule which is now well established at Law must for the future prevail in Equity.

CHAPTER VI.

Chap. VI.

AS TO THE AGREEMENT.

1. *As to the general necessity for a written agreement.*
2. *The preparation of formal agreements*
3. *What informal documents may constitute an agreement.*
4. *The signature.*
5. *The stamps.*
6. *As to illegal agreements*

(1.) UNDER the Statute of Frauds (a), a written memorandum or note of agreement, signed by the party to be charged, or his agent, is generally (b) necessary, as the only receivable evidence (c) of any contract for the sale or purchase of lands, tenements, or hereditaments, or any estate or interest in or concerning them; whether such estate or interest be subsisting, or be proposed to be created *de novo* and the Act extends to sales by auction (d), and in Bankruptcy (e); but not, it is said, to sales by the Court (f), nor to purchases under the order of the Court, if the owner of the estate make no opposition to the confirmation of the report approving of the purchase (g): not apparently to agreements

Section 1.

As to the general necessity for a written agreement.

Written agreement generally necessary under Statute of Frauds.

What sales not within the statute.

(a) 29 Car. II. c. 3, see section 4; Sug 121. Under this section the agent need not be appointed in writing.

(b) See an exception in cases of partnership, *Essex v. Essex*, 20 Bear. 442; but see contra, *Cuddick v. Skidmore*, 2 De G. & Jp. 52.

(c) For the Act does not avoid a parol contract, but merely, as a general rule, precludes its being given in evidence; see *Leroux v. Brown*, 10

Jur. 1021, C. B.; *Barkworth v. Young*, 4 Drew 1.

(d) See *Att-Gen. v. Day*, 1 Ves. 218; and 12 Ves. 472; *Higginson v. Clowes*, 15 Ves. 521.

(e) *Ex parte Cutts*, 3 Dea. 267, Lord Cottenham.

(f) See 1 Ves. 218; *Lord v. Lord*, 1 Sim. 508; but the purchaser is always required to sign.

(g) See 1 Ves. 218; 12 Ves. 472.

VI.

by deed (A), sealing and delivery being in such cases sufficient without signature.

Parol executory agreement for lease,

or for assignment of terms less than three years, void.

And although an actual demise by parol for any term not exceeding three years, at a rent not less than two-thirds of the improved value, is valid under the 2nd section of the Statute (i), an executory agreement for such a demise is void unless in writing. So a parol agreement by a lessee for an assignment of the residue of his term (being less than three years) is void; and cannot, it would seem, operate as an underlease (k).

An instrument void as a lease may be supported as an agreement.

A lease for a term exceeding three years must, under the 1st section, be in writing, and now, under the 8 & 9 Vict. c. 106, s. 3, by deed; but in Equity, an instrument containing present words of demise, but void as a lease for want of sealing and delivery, will be supported as an agreement (l). In one case, a document, not under seal, and therefore void as a lease, has been held at Law to be also void as an agreement (m); but the soundness of this decision has been questioned; and in a later case, where by the same instrument, not under seal, A. agreed to let and B. to take certain premises from the date of the agreement until Lady-day then next, and thenceforward for three years, but as to the latter term the consent of the landlord was to be obtained, and a lease was to be executed, it was held that there was a lease for the former period, and an agreement for a lease as to the latter (n); so where a document void as a lease contained an undertaking to grant a lease, it was held that it was good as an agreement, and that an action would lie on the contract (o).

(A) *Cherry v. Needham*, 4 Exch. 1, 636.

(i) *See Crosby v. Wadsworth*, 6 East, 602, 610, *Lord Bolton v. Tomlin*, 5 Ad. & E. 857, 864.

(k) *Barrett v. Rolph*, 14 M. & W. 348.

(l) *Farker v. Turner*, 3 De G. & J. 559; see, too, *Clyden v. Phillips*, 9 Jur. N. S. 657.

(m) *Stratton v. Pettit*, 1 Jur. N. S. 662; 16 C. B. 420; *Drury v. Manamara*, 1 Jur. N. S. 1163; *F. & B.* 612; but see *Travis v. Savage*, 4 E. & B. 1.

(n) *Stratton v. Pettit*, 7 Jur. N. S. 600; and see comments on *Stratton v. Pettit*.

(o) *Bond v. Roeling*, 8 Jur. N. S. 78.

The first section of the Act, which renders a writing necessary for the creation of "all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in or out of any lands," &c., has been held not to extend to a licence; *e.g.*, a licence to A., in consideration of a yearly payment, to stack coals on a piece of ground for seven years, with the sole use of the land so employed (*p*); but although this decision has been often followed (*q*), its authority, so far as it may tend to show that an irrevocable interest may be thus created, seems to be destroyed by subsequent cases which decide that an easement cannot, at least as against the inheritance (*r*), be granted without deed (*s*): it is also conceived that a parol executory agreement for such a licence would probably be invalid; the words, "in or concerning," in the 4th section, being, apparently, more comprehensive than the words, "of, in, or out of," in the 1st section.

Chap. VI.
Sect. 1.

Whether
parol licence
is valid.

Seemle, not.

A mere licence is revocable by the grantor at any time (*t*); but reasonable notice of the revocation should be given (*u*). Where a memorandum was endorsed on a lease, that the lessee should have the exclusive right of sporting over the demised and adjoining properties, and there was evidence that the enjoyment of this privilege was an essential part of the consideration for taking the lease, the landlord was restrained from interfering with the right, until he had executed a proper legal grant (*x*).

Licence
revocable.

Any arrangement which is substantially, although not Any agree-
ment sub-

(*p*) *Wood v. Lark*, Say. 3; also reported 13 M. & W. 348. See as to the effect of licences, *Doe v. Wood*, 2 B. & Ald. 724.

(*q*) Sug. 123, 124; see cases cited, 13 M. & W. 840.

(*r*) See 8 Q. B. 778.

(*s*) See 1 Jarm. Conv. by S. 239, and cases there cited; and, in particular, *Cocker v. Cowper*, 1 Cro. M. & R. 418; *Bird v. Higginson*, 4 Nev. & M. 505; and see *Wood v. Leadbitter*, 13 M. & W. 838; *Perry v. Fitzhugh*,

8 Q. B. 757; *Adams v. Andrews*, 15 Q. B. 281; *Ruffey v. Henderson*, 21 L. J. 49, Q. B.

(*t*) *Wood v. Leadbitter*, 13 M. & W. 838, which see also as to the distinction between a mere licence, and a grant with a licence annexed.

(*u*) *Cornish v. Stubbs*, L. R. 5 C. P. 834; *McIlor v. Watkins*, L. R. 9 Q. B. 400.

(*x*) *Frogley v. Earl of Lovelace*, Johns. 338.

Chap. VI.
Sec. 1.
Statute
for a sale, in
within the
statute.

expressedly, a sale of an interest in land, is within the 4th section, and requires a written contract: *e.g.*, an agreement by a person possessed of a term for years, to give up possession to another, and allow him to become tenant for the remainder of the term, in consideration of his paying in part for certain repairs (*y*); or an agreement by the termor to quit possession on a certain day, and pay all outgoings up to that time, in consideration of a sum of money to be paid to him by a party who has agreed with the landlord for a lease of the premises on the termination of the subsisting term (*z*); or an agreement by a termor, under similar circumstances, that he will part with the land, and that the intended lessor shall take it (*z*), or an agreement by a person who has no interest in the property, to procure a sale and conveyance of it to a person who wants to buy it (*a*).

So, a parol agreement by A with an occupying tenant to pay him £100, upon the tenant surrendering his lease, and procuring the landlord to accept A. as tenant, is void (*b*); nor can the tenant sue for the consideration, upon the contract, although he have performed his part of it; but he may sue upon an account stated, if, after such performance, A. have admitted that he is indebted to him in the amount of the consideration (*b*). So, where there was a parol agreement for the transfer of a tenancy, and the transferee promised to pay the arrears of rent, it was held that the transferor could not recover damages for breach of the promise (*c*).

Agreement
merely col-
lateral, *e.g.*,
by mortgagor
to pay costs.

But an agreement merely collateral to a proposed dealing with land does not seem to be within the Act: *e.g.*, an agreement by an intending mortgagor to pay to an intending mortgagee his costs of investigating the title, should such title prove bad (*d*): so where the agreement, so far as it

(1) *Bulmer v. Hayes*, 3 Jur. 704.

(2) *Smith v. Tombs*, 3 Jur. 72.

(3) *Horley v. Graham*, L. R. 5

(4) *Cocking v. Wain*, Q. B. 355;

(5) *Kelly v. Webster*, 12 C. B. 333;

(6) *Smart v. Harding*, 3 Q. B. 351;
15 C. B. 652.

(c) *Hodges v. Johnson*, 5 Jur. N. S. 290; 1 E.R. 31, & E.R. 685.

(d) *Jones v. White*, 6 Exch. 673.

relates to land, has been executed, it has been held that an action will lie for the non-performance of a special promise to be performed after execution, as, *e.g.*, an undertaking to repay part of the price on a certain event (*e*).

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An agreement void under the 4th section, may, until countermanded, operate as a licence, so as to excuse what would otherwise be trespass (*f*).

Void agreement may, as a licence excuse trespass.

And the transfer in writing of a parol, and therefore void, agreement for purchase of an estate, will be a good consideration as between transferor and transferee, if the latter actually obtain a conveyance from the vendor (*g*): so, if an agent for purchase enter into a parol agreement, and pay the purchase-money, and procure a conveyance, he can sue his principal for the amount (*h*).

Written transfer of parol agreement.

The words in the 4th section relating to "any estate or interest" in lands have been held to extend to shares in a mining company (*i*), unless conducted on the cost-book principle (*k*); and to Westminster Improvement Bonds (*l*), but not to shares in a railway company, at least if the Act of Incorporation makes them personal estate (*m*); so too they extend to a partnership in land (*n*).

Mining but not railway shares within the 4th sect.

Questions frequently arise as to the necessity for a written agreement for the sale of growing crops; the law upon the

Sale of growing crops.

* (*e*) *Green v. Saddington*, 7 E. & B. 503; 3 Jur. N. S. 717; *Cocking v. Ward*, 1 C. B. 858; and see *Griffiths v. Young*, 12 East, 513.

(*f*) *Carrington v. Roots*, 2 M. & W. 248; See *Crosby v. Wadsworth*, 6 East, 602; *Winter v. Brockwell*, 8 East, 808; and see 8 Q. B. 778; and *Ruffey v. Henderson*, 21 L. J. 49, Q. B.

(*g*) *Seaman v. Price*, 1 Ry. & M. 195.

(*h*) *Parole v. Gunn*, 4 Bing. N. C. 445.

(*i*) *Boyce v. Greene*, Bat. 608; but see comments on this case in Lindley, 2nd ed., p. 674.

(*k*) *Watson v. Spratley*, 10 Exch. 222; see, too, *Powell v. Jessop*, 18 C. B. 336; *Walker v. Bartlett*, *ib.* 845; and *Hayter v. Tucker*, 4 K. & J. 243.

(*l*) *Toppin v. Lomas*, 16 C. B.

(*m*) *Bradley v. Wadsworth*, 3 M. & W. 422; *Donner v. Albrecht*, 12 Sim. 189; *affd.*

* (*n*) *Caddick v. Midmore*, 2 De G. & Jo. 52.

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subject can hardly be considered as settled (o); but the following appears to be the general result of the authorities:—

The point to be determined in such cases is, whether the interest contracted for is an interest in land within the meaning of the 4th section of the Statute of Frauds;—in which case a written agreement is necessary;—or whether the contract is merely for the sale of chattels; in which case, however, unless the price be under £10, there must, under the 17th section, be a written agreement or memorandum, signed by the party or by his agent, or part payment of the price, or part acceptance of the goods (p): but a bill of lading, which is the symbol of the property, may be so dealt with as to constitute an acceptance within the 17th section (q); thus, where goods remained in the possession of the seller, but the buyer, to whom an invoice had been sent, dealt with them as if warehoused on his behalf, it was held that there was a constructive acceptance which satisfied the statute (r): the mere agreement however does not, until the time for its completion has arrived, transfer the property in chattels (s).

Cases within
the 4th
section.

An agreement for sale of the exclusive right to the vesture of land, or for sale of crops which would not go as emblements to the executor (t) as mowing grass (u), standing underwood (v), poles or timber, is within the 4th section; nor, in the case of grass, does it appear to be material whether it is to be mowed or fed off by the purchaser; that is, if, in the latter case, he is to have the exclusive

(o) Sug. 124—126.

(p) *Emith v. Surman*, 9 B. & C. 569.

(q) *Meredith v. Meigh*, 2 E. & B. 364; *Carrie v. Anderson*, 6 Jur. N. S. 448.

(r) *Cusick v. Swords*, 8 Jur. N. S.

Lanyon v. Topham, 13 M. & W. 217; and see *Staddon v. Cruikshank*, 16 M. & W. 71. See as to acceptance, *Saunders v. Tapp*, 4 Exch.

390, and cases cited; and *Morton v. Tibbett*, 15 Q. B. 428; *Holmes v. Hollins*, 9 Exch. 753.

(t) See judgment in *Evans v. Roberts*, 5 B. & C. 829: and as to emblements, *Graves v. Wehl*, 5 B. & Ad. 105; Sug. 125.

(u) *Osney v. Wednesorth*, 6 East, 602; *Corrington v. Roots*, 2 M. & W. 248.

(v) *Scovell v. Boxall*, 1 Y. & J. 396.

right to it (*y*); so, also, an agreement for the sale of growing fruits (*e.g.*, pears) (*z*), is within the 4th section.

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But if the agreement be for sale of the crop after the seller shall have reduced it to a chattel by severance from the freehold, as where standing timber is to be felled by the vendor, the 4th section does not seem to apply (*a*): and the same distinction would, it is conceived, exist in agreements for the sale of gravel (*b*), stone, or other minerals: nor does the 4th section seem to affect sales of crops which would go as emblements (*c*); such as hops (*d*), wheat, potatoes, turnips (*e*), &c.: nor does it appear material in such cases whether the crop at the time of sale is mature or otherwise, or whether it is to be removed by the buyer or seller, or to be paid for by the quantity or by the acre (*f*); and even in the case of grass, if the vendor retain possession of the land, and the right of turning on his own cattle, and the purchaser have no right of severance, but only to feed it off along with the vendor, the agreement is merely for agistment, and is not within the 4th section (*g*); nor does this section apply to an agreement in respect of damage to the surface (*h*): but in none of these cases is it prudent to dispense with a written contract.

Cases not within the 4th sect.

Emblements.

And a parol agreement, for the sale of growing crops, which would otherwise be void under the 4th section, may be good as between outgoing and incoming tenants (*i*): but a sale of the growing crops by the lessor to the incoming tenant, seems to require a written contract under the 4th

Parol agreement good between tenants; but not as between lessor and incoming tenant.

(*y*) See *Jones v. Flint*, 10 Ad. & E. 760.

(*z*) *Rodwell v. Phillips*, 9 M. & W. 501; *sed qu.* Whether so, if the crop be mature at the time of sale?

(*a*) *Smith v. Surman*, 9 B. & C. 551; and see 1 Cr. & M. 105.

(*b*) See *Coulton v. Ambler*, 13 M. & W. 403.

(*c*) Sug. 125; but see *Waddington v. Bristow*, 2 B. & P. 452.

(*d*) *Evans v. Roberts*, 5 B. & C. 829; see judgment; and Sug. 126.

(*e*) *Dunne v. Ferguson*, 1 Hay, 541.

(*f*) *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 Mau. & S. 205; *Evans v. Roberts*, 5 B. & C. 829; *Hallen v. Runder*, 1 Cro. M. & R. 266, 275; *Sainsbury v. Matthews*, 4 M. & W. 343; *Dunne v. Ferguson*, 1 Hay, 541.

(*g*) *Jones v. Flint*, 10 Ad. & E. 760.

(*h*) *Griffiths v. Jenkins*, 10 Jur. N. S. 207.

(*i*) *Mayfield v. Wadley*, 3 B. & C. 357; and see Sug. 125.

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section (k). The reason for the distinction which has been drawn between the two cases in favour of the former of them seems to be far from clear.

Vendor's
remedy if
purchaser
takes the crop.

And although an agreement be void under the 4th section, the seller (unless perhaps the parties be landlord and tenant) can recover the value of the crop if it be taken or receive by the purchaser (l); but he cannot recover on the terms of the agreement, but only on a *quantum valebat* (m).

An agreement
to take fur-
nished
lodgings not
within the
4th sect.

An agreement to take furnished lodgings in a boarding-house, is not a contract for an interest in land within the 4th section (n)

Parol agree-
ment for sale
of tenant's
fixtures,
whether
sufficient.

A sale of tenant's fixtures by the tenant to the landlord, has been held not to be within the 4th section, although they be sold while attached to the freehold (o): the so-called sale of the fixtures being merely a renunciation of the right to remove them

Agreement
for increase,
or abatement,
of rent.

An agreement by a tenant to pay an increased sum by way of rent, in consideration of improvements to be made by the landlord, has been held not to be within the Act; and therefore to be valid although by parol (p): but a different rule has been laid down as respects an agreement for abatement of rent (q). In the one case the agreement is, in effect, to pay the landlord, by instalments, for services rendered; in the other, the agreement is for a *release* of part of the rent.

Void
agreement
for
(inter)

If an agreement relating to the sale of land be void under the 4th section, it will also be void as respects any other

(k) *Lord Palmouth v. Thomas*, 1 Cr. & M. 39.

(l) *Taill v. Aytz*, 4 Moo. 542; *Knowles v. Michel*, 13 East, 249.

(m) 1 Cr. & M. 109.

(n) *Wright v. Storer*, 6 Jur. N. S. 867.

(o) *Hallen v. Rinder*, 1 Cr. M. & H.

266, 276; and compare *Lee v. Risdon*, 7 Taunt. 158.

(p) *Donnellan v. Rands*, 3 B. & A. 899, 904; *Holy v. Rinder*, 7 Taunt. 157.

(q) *O'Connor v. Knight*, 1 Sch. & L. 506.

matters, which are either inseparably mixed up with, or are dependent upon, the principal agreement (*r*): *e.g.*, where a tenant agreed to rent a furnished house, and the landlord was to supply additional furniture after the tenant had taken possession, it was held, that the want of a written contract was a bar to an action for non-delivery of the furniture (*s*); so, upon a parol agreement to let a house, and to make certain repairs, which the tenant was to pay for, it was held that the landlord could not sue him for the cost of such repairs (*t*): but this rule does not apply where the contracts, though in a sense connected with each other, are in fact independent and separable (*u*)

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the sale of
land, where
void, *in toto*.

(2.) *As to the preparation of formal agreements.*

Section 2.

Upon formal agreements for sale, few questions arise distinguishable from those which have been already considered with reference to the particulars and conditions.

As to the
preparation
of formal
agreements.
As to formal
agreements.

In framing such agreements, it is usual to make the parties agree, each "for himself, his heirs, executors, and administrators:" the insertion of the word "heirs," however, is scarcely correct, unless the instrument be under seal; and it is not necessary, although the general practice, to name the personal representatives.

As to naming
the represen-
tatives of the
parties.

Upon a sale by auction, the agreement, of course, refers to, and is generally written or printed upon, a copy of, the particular and conditions.

Agreement
on sale by
auction,
refers to
particulars,
&c.

It seems to be desirable for both parties when several lots are bought by the same purchaser to have a separate contract for each lot; instead, as not unfrequently happens, of

(*r*) *Cooke v. Tombs*, 2 Anst. 420; see *Mayfield v. Wadley*, 3 B. & C. 357, 361; and two next notes.

(*s*) *Neckden v. Wallace*, 7 Ad. & E. 49.

(*t*) *Vaughan v. Hancock*, 3 C. B.

786; and see *Lord Falmouth v. Thomas*, 1 Cr. & M. 89.

(*u*) *Green v. Saddington*, 7 E. & B. 503; 3 Jur. N. S. 717; *Cooking v. Ward*, 1 C. B. 358.

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all the lots being included in a single contract at a lump sum.

What to be comprised in agreement, on sale by private contract.

Upon a sale by private contract, the agreement (which is usually prepared by the vendor), as a general rule, comprises whatever stipulations and other matter would, had the sale been by auction, have been comprised within the particular and conditions; except such matter as exclusively applies to an auction. When it is probable that special stipulations, as to title, &c., will be necessary, the agreement should be prepared in blank before the estate is offered for sale. A purchaser, on buying house property, should require any existing policies of insurance to be included in the contract; and on the purchase of a reversion, he ought to procure a stipulation to be inserted in the contract, that the vendor shall pay the succession duty and indemnify him therefrom (x); or, shall at once compound for and pay it.

What supplied by Vendor and Purchaser Act, 1874.

The rules prescribed by the Vendor and Purchaser Act, 1874 (y), and which, subject to any stipulation to the contrary in the contract, now regulate the obligations and rights of vendor and purchaser, apply equally whether the land (z) is sold by public auction or by private treaty.

Matters to be provided for, in agreement for sale to public companies, &c.

In preparing agreements for the sale of land to promoters of public undertakings, care should be taken to state whether the purchase-money is to be in lieu of those accommodation works which the promoters are *prima facie* bound to make and maintain for the owners of adjoining land; and whether the ordinary or statutory rule as to the expenses of the purchaser is to operate (a): the agreement for sale to a railway or waterworks company, should, if such be the intention, expressly state that the mines and minerals are included in the purchase (b).

(x) See *Cooper v. Treby*, 28 Beav. 194.

(y) 37 & 38 Vict., c. 73, sect. 2.

(z) This enactment does not seem to extend to a contract for the sale of

an incorporeal hereditament.

(a) See *Freud and Ware's R. Conv.* 146.

(b) See 8 & 9 Vict. c. 20, s. 77, and 10 & 11 Vict. c. 17, s. 18.

When a lease or other document contains a clause giving the lessee or any other person a right of preemption, the same or like stipulations should be inserted for the protection of the future vendor in respect to title, expenses, and other matters, as would be inserted in an absolute contract for sale and purchase. The precaution is one which is frequently omitted in preparing leases which contain preemption clauses.

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Preemption
clauses.

(3). *As to what informal documents may constitute an agreement.*

Section 3.

As to what
informal docu-
ments may
constitute an
agreement.
Informal
agreements.
What may be
a sufficient
agreement
within the
statute.

Informal agreements give rise to questions of greater difficulty.

We may lay down as general, although not universal rules, 1st, that any writing signed by the party to be charged, or his agent, and which, either expressly or by reference to other writings, determines the parties to and subject-matter of a contract, and fixes, or provides the compulsory means of fixing, all its terms, is a sufficient agreement within the Statute; and, 2ndly, that no writing is a sufficient agreement, which fails in any of the above-mentioned particulars.

Thus letters are constantly held to constitute a binding contract; and often where such a result is a surprise upon the writers (c): and a letter addressed by either a vendor, or, it would appear, a purchaser, to a third person, with directions incidental to the carrying out of the agreement—e.g., the delivery of title deeds, or preparation of the conveyance—may suffice to bind the writer (d): and a letter,

Letters.

(c) *Kennedy v. Lee*, 3 Mer. 441. "The same construction must be put upon a letter, that would be applied to the case of a more formal instrument; the only difference being, that a letter, or correspondence, is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise con-

clusion." *Per* Lord Eldon, *ibid.* 451; see also *Ogilvie v. Foljambe*, 3 Mer. 53; *Thomas v. Blackman*, 1 Coll. 301; and *Green v. Cramer*, 2 Con. & L. 54, 63; and see *Fitzmaurice v. Bayley*, 3 Jur. N. S. 264; *revd. on app.* (Exch. Ch.) 4 Jur. N. S. 506; (H. L.) 6 Jur. N. S. 1215.

(d) *Walford v. Beazley*, 3 Atk.

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which contained an admission of the bargain, and of all its essential terms, has been held a sufficient memorandum to satisfy the Statute, notwithstanding that the writer at the same time repudiated his liability (e): so, also, letters written with reference to a pending dispute as to whether a parol agreement has been duly performed; and embodying the terms of that agreement (f): so, the vendor's receipt for the purchase-money or deposit, or a similar receipt signed by the auctioneer, or the entry of sale made by him in his books (g), or a bond of reference to a surveyor to settle the price to be paid by the purchaser, would, it appears, be sufficient (h): and in one case, where there was a parol agreement in contemplation of marriage, and after the marriage, an affidavit in another matter was sworn and filed by the person sought to be charged, it was held that there was a sufficient memorandum to satisfy the Statute (i)

Receipt for purchase-money.

As to contracts of preemption.

Strictly construed.

Where a will gave to A an option of purchase within a limited period, a mere verbal declaration to the trustees that he intended to take the property, the purchase-money remaining unpaid and the conveyance unexecuted, was, of course, held insufficient (l). Such an option can, doubtless, be enforced (l), but the conditions imposed on its exercise are always strictly construed; and all precedent conditions must be fulfilled by the purchaser before any contract binding the vendor can arise (m). Thus where the donee of a right of preemption on payment of the price within a limited time, duly signified his intention of purchasing and

503; *Cooke v. Tombs*, 2 Anst. 420, 426; *Owen v. Thomas*, 3 Myl. & K. 353; *Rose v. Cunyngname*, 11 Ves. 550; Sug. 139; *Goodwin v. Fielding*, 4 De G. M. & G. 90.

(e) *Bailey v. Sweeting*, 9 C. B. N. S. 648; see, too, *Gibson v. Holland*, L. R. 1 O. P. 1, and cases there cited.

(f) *Pyson v. Kitson*, 3 C. L. R. 705.

(g) *Cole v. Frenthick*, 9 Ves. 234; *Magden v. Bradbeer*, 12 Ves. 464; *Goodell v. Archer*, 2 Ad. & El. 500; *Hammer v. Hoole*, 2 Taunt. 38, 48;

Sug. 134, 139.

(h) *Per Lord Rosslyn*, 6 Ves. 17.

(i) *Barkworth v. Young*, 4 Drew. 1; but see the form of the affidavit, and *quere*. As to an answer in Chancery being a sufficient memorandum, see *Ridgway v. Wharton*, 5 De G. M. & G. 677, and *vide infra*.

(k) *Damon v. Damon*, 8 Sim. 346.

(l) *Lord Brough v. Shafte*, 11 Ves. 448, 454; *Quinn v. Cookson*, 8 Sim. 529.

(m) *Wright v. Collins*, 11 Jur. N. S. 190.

applied for an abstract, but the prescribed period expired without the purchase-money being paid or any further step taken, the right of preemption was lost (n); but where there was a contract for a lease with a right of preemption, it was held that the right to purchase was independent of the right to a lease, and was not avoided by the forfeiture of the latter (o). Whether an option of purchase, "at all times thereafter," when created by agreement, can be exercised after the death of the owner of the property, has been doubted (p); and unless its exercise be restrained by the context to a period allowed by the rule against perpetuities, the validity of the power *in toto* may be open to question. But where there was an agreement to let a house for three years, and at the tenant's request to grant a lease from the expiration of the tenancy, the tenant who had continued in occupation was held entitled four years after the expiration of the three years' tenancy to have a lease granted (q); so where two partners were possessed of freeholds, with an option for the survivor to purchase the whole, if either should die during the partnership term, and the partnership was prolonged by parol arrangement, it was held that the right of preemption continued subsisting (r). Where an option of purchasing is given at what the trustees shall consider to be a fair and reasonable price, their decision, in the absence of fraud, is conclusive (s).

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Right of option "at all times thereafter."

Notice given by a railway or other public company (t) of their intention to exercise a power of compulsorily taking land (u), constitutes a contract binding on the company to

Notice by or to railway companies, &c.

(n) *Brooks v. Garrod*, 3 Ka. & Jo. 008; 2 De. G. & Jo. 62; see, too, *Al-derston v. White*, 3 Jur. N. S. 1816; 2 De G. & Jo. 97.

(o) *Green v. Low*, 22 Beav. 625; but see the terms of the contract. See as to what is a sufficient exercise of the option, *Powell v. Leacroft*, 8 De G. M. & G. 357; *Austin v. Tawney*, L. R. 2 Ch. Ap. 143.

(p) *Stocker v. Dunn*, 16 Beav. 161.

(q) *Moss v. Barton*, L. R. 1 Eq.

474; see, too, *Buckland v. Papillon*, *ib.* 477.

(r) *Essex v. Essex*, 20 Beav. 442; but see *Caddick v. Skidmore*, 2 De G. & Jo. 52.

(s) *Edmonds v. Millett*, 20 Beav. 54.

(t) The case seems to be different with Commissioners under a Public Act, see *Reg. v. Commissioners of Woods and Forests*, 15 Q. B. 761.

(u) As to the extent of such

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not simpler
a contract.

the extent of fixing what land is to be taken (*x*); and cannot be withdrawn by the company without the consent of the landowner (*y*); and the price, if not settled by agreement, must be determined in the manner pointed out by the Act of Parliament (*z*): but the mere service of the notice does not constitute a contract by the landowner for the sale of his land; nor is there, strictly speaking, any contract between the parties until they have come to some definite arrangement as to the terms, or until the value of the land to be taken has been ascertained by arbitration, or a jury (*a*). Thus, where the landowner, after service of the notice, stated the price which he was willing to take, but died before his offer was accepted, it was held that, although the purchase was afterwards completed at that price, there was no contract binding on the heir (*b*). Where, however, the price is ascertained, either by arbitration (*c*) or by the valuation of two surveyors (*d*), or

powers, with reference to 8 & 9 Vict. c. 20, s. 16, see *Cotter v. Milland R. Co.*, 2 Ph. 469; *Beardner v. London and N. W. R. Co.*, 1 Mac. & G. 112; *Sidd v. Mallon, &c., R. Co.*, 6 Exch. 143. As to how far tunnelling under, or throwing an arch over, property is a "taking," see *Sparrow v. Oxford, &c., R. Co.*, 2 De G. M. & G. 108; *Pinchin v. Blackwall R. Co.*, 1 K. & J. 46, 47, 66; 5 De G. M. & G. 551.

(*z*) *Adams v. Blackwall R. Co.*, 2 Mac. & G. 118; 6 Rail. Ca. 271.

(*y*) *Towney v. Lynn and Ely R. Co.*, 16 L. J. N. S., Ch. 282, V.-C. E.; and see *Reg. v. Birmingham and Oxford Junction R. Co.*, 15 Q. B. 634; aff'd. 647; and see 13 & 14 Vict. c. 83, s. 20, recognizing the principle as respects abandoned lines; *Barker v. N. Staf. R. Co.*, 5 Rail. Ca. 401; *Lanc. &c., R. Co. v. Evans*, 15 Beav. 331; *Blount v. Great S. & W. R. Co.*, 2 L. Ch. R., 40; *Lord Salisbury v. Great N. R. Co.*, 3 E. & B. 443; *Edinburgh R. Co. v. Leven*, 1 Macq. H. L. C. 244; and see now the Amendment of Railways Act, 1902,

32 & 33 Vict. c. 114.

(*a*) See *Rev v. Hungerford Market Co.*, 4 B. & Ad. 317; *Salmon v. Randall*, 3 Myl. & C. 439; *Stone v. Commercial R. Co.*, 4 Myl. & Cr. 124; *Walker v. Eastern Counties R. Co.*, 6 Ha. 504; *Stamps v. Birmingham and Stour Valley R. Co.*, 2 Phil. 673; *Burkinshaw v. Birmingham, &c., R. Co.*, 5 Exch. 475; *supra*, p. 56, *infra*, Ch. X. s. 5; *Adams v. Blackwall R. Co.*, 2 Mac. & G. 118; *Haynes v. Haynes*, 1 Drew. & Sma. 426; and see *Grierson v. Cheshire Lines Committee*, L. R. 19 Eq. 83.

(*a*) *Haynes v. Haynes*, 1 Drew. & Sma. 426, disapproving *Walker v. Eastern Counties R. Co.*, 6 Ha. 504; and see, too, *Adams v. Blackwall R. Co.*, 2 Mac. & G. 118; *Regent's Canal Co. v. Ware*, 23 Beav. 575; and judgment of V.-C. Kindersley in *Haynes v. Haynes*, and cases there cited.

(*b*) *Re Arnold*, 32 Beav. 591; 9 Jur. N.S. 383.

(*c*) *Harding v. Metrop. R. Co.*, L. R., 7 Ch. Ap. 154.

(*d*) *Watts v. Watts*, L. R. 17, Eq. 217.

by agreement, or the verdict of a jury (e), the contract is complete, and may be specifically enforced against the company. A notice to treat, given to and acquiesced in, by tenants for life having a joint power of absolute appointment over the settled estate, does not amount to such a defective exercise of the power as the Court can aid as against the remainderman (f): nor, if given to a person having a defeasible interest in the estate, and which is defeated by other parties in their conveyance to the company, does it give such person any right of suit against the company (g). Where notice is served on a lessee, who is restrained from alienating without his lessor's licence, the necessity of obtaining such licence is taken away by the operation of the Act (h).

Notice by a company under the Lands Clauses Consolidation Act, of their intention to take part only of any house, or other building or manufactory, does not amount to an agreement to take the whole, although under the 92nd section of the Act the owners may, by counter-notice, require the company to take the whole or nothing (i): and thereupon a Court of Equity will restrain the company from taking less than the whole (k): the effect of the landowner's counter-notice being to arrest the operation of the company's notice, conditionally on the landowner's being able and willing to sell the whole: but if he declines, or is unable so to do, the company's notice revives (l). Although the landowner can compel the company, when they require only a part, to take the whole of the remaining property comprised in the

Notice by
railway
companies
to take part
of a house.

Effect of
counter-notice
by landowner.

(e) See the judgment in *Haynes v. Haynes*, *ubi. suprad*; and *vide infra*, Ch. VII. s. 5.

(f) *Morgan v. Milman*, 3 De G. M. & G. 24.

(g) *Hill v. Great Northern R. Co.*, 5 De G. M. & G. 66; as to whether the notice converts the estate into personality as between the landowner's real and personal representatives, *vide infra*, Ch. VII. s. 5.

(h) *Slipper v. Tottenham and H.*

Junction R. Co., L. R. 4 Eq. 112.

(i) *Reg v. London and South-Western R. Co.*, 12 Q. B. 775.

(k) *Sparrow v. Oxford, &c. R. Co.*, 2 De G. M. & G. 94: as to the effect of tunnels and arches, see *S. C.*, 108; *Pinchin v. Blackwall R. Co.*, 1 K. & J. 46, 47, 66; 5 De G. M. & G. 851; *Furniss v. Midland R. Co.*, L. R. 6 Eq. 473.

(l) See *I K. & J. 68*.

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word "house," he cannot, it seems, compel them to take merely a portion of it (*m*). The right of giving such counter-notice is not lost, if the company, having served a notice to take part of the property, refuse to pay the price demanded for it (*n*); and where the company give notice to take a part, and are served by the landowner with a counter-notice to take the whole, the amount to be secured by deposit and bond under the 85th section, before possession can be taken, is the value of the entire property (*o*).

As to the
meaning of
the word
"house"
under the
Lands Clauses
Consolidation
Act.

The word "house" in the 92nd section is construed liberally; and includes everything which will ordinarily pass under that word in a conveyance (*p*). Thus, where the company required only a small portion of the garden, they were compelled to take the whole property (*q*); even where the houses were unfinished, and in a ruinous state (*r*); so, also, where they required greenhouses and ornamental pleasure ground connected with the residence which was not touched, the rest of the land being used as a nursery garden (*s*). But a cottage built upon land used as a market-garden and occupied merely for the more beneficial occupation of the land as a market-garden, does not with the land constitute a "house" within the meaning of the section (*t*); so, also, where the landowner was entitled under the same lease to a messuage and garden on one side of a public highway, and to a detached piece of pleasure ground on the opposite side, on which he was prohibited from building, and which alone the company was desirous of purchasing, it was held that the detached portion formed no part of the "house" within the meaning of the Act (*u*); so also, where the por-

(*m*) *Pulling v. L. C. and D. R. Co.*, 33 Beav. 644; *affd. dubitante L. J. Knight Bruce*.

(*n*) *Gardner v. Charing Cross R. Co.*, 8 Jur. N. S. 51; 2 J. & H. 248.

(*o*) *Underwood v. Bedford and Cambridge R. Co.*, 7 Jur. N. S. 941; *Dadson v. East Kent R. Co.*, 13. 941.

(*p*) *St. Thomas Hospital v. Charing Cross R. Co.*, 1 J. & H. 440.

(*q*) *Ode v. West London R. Co.*, 27

Beav. 242; *Grovesnor v. Hampstead Junction R. Co.*, 1 De G. & Jo. 444; *King v. Wycombe R. Co.*, 28 Beav. 104.

(*r*) *Alexander v. Crystal Palace R. Co.*, 30 Beav. 558.

(*s*) *Buller v. Metrop. Dist. R.*, Co., L. R. 9 Eq. 511.

(*t*) *Mellor v. Somerset and Dorset R. Co.*, L. R. 10 Eq. 458.

(*u*) *Ferguson v. London and Brighton R. Co.*, 33 Beav. 103; *affd. on ap-*

tion, separated by the highway, was used for the purpose of pasturing horses and cows for the owner's establishment (*x*); so in the case of two contiguous dwelling-houses the mere continuity of the open space immediately under the roof and above the party-wall which separate the attics up to their ceiling, and the inter-communication of the drains and gutters, do not constitute the two dwellings a single "house" (*y*); but in one case, a vacant piece of land, not fenced off from the street, and separated from the house by a public footway, but forming the only means of approach for vehicles, was held to be part of the "house" within the meaning of the Act (*z*). The result of the cases seems to establish that what is necessary for the convenient use and occupation of the house, but not what is subsidiary to the personal use and enjoyment of the occupier, falls within the statutory meaning of the word. It is, however, obvious that cases may occur in which garden or pleasure ground separated from a house, even by a public high-road, may be almost as material to the due enjoyment of the house, as if the separating road had no existence. *e.g.*, where the road is in a cutting, and there is a bridge thrown across it.

Where the company required to take part of a building which had been used as a manufactory, though such user had been discontinued for several years, they were compelled, at the instance of the landowner, not only to take the whole, but also all the machinery and trade fixtures therein (*a*). So where a railway company gave notice of their intention to take a mill-goit and weir, which occasionally supplied the motive power for the machinery, they were compelled

What is a
"manufac-
tory" within
the Act.

peal, the Lords Justices differing in opinion: *et quare*.

(*x*) *Steele v. Midland R. Co.*, L. R. 1 Ch. Ap. 275; *substante* L. J. Knight Bruce.

(*y*) *Harris v. South Devon R. Co.*, Weekly Notes, 1874, 195; on appeal, *ib.* 218.

(*z*) *Marson v. London, Chatham and Dover R. Co.*, L. R. 6 Eq. 101; and see *Grierson v. Cheshire Lines'*

Committee, L. R. 19 Eq. 83; as to what is part of a "house" within the 92nd section, see *Anon.*, cited 3 De G. & S. 420.

(*a*) *Gibson v. Hammersmith and City R. Co.*, 9 Jur. N. S. 221; and as to what is a "manufactory," see *Barker v. N. S. R. Co.*, 2 De G. & S. 55; *Dakin v. L. and N. W. R. Co.*, 3 De G. & S. 414.

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to take the whole manufactory, although they proposed to carry the railway over bridges which would not interfere with the water supply (b).

Statutory
power not
exhausted by
single notice.

Under the above Act, a company may give a second notice to the same landowner in respect of land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under the first notice prove insufficient for the authorized purposes of the undertaking (c); but they may not make use of their compulsory powers to attain a subsidiary object, not authorized for the purposes of their undertaking (d). Where a landowner is entitled by notice to require the company to purchase his interest in lands affected by the undertaking, the service of such notice constitutes the relation of vendor and purchaser (e); but it seems now to be settled that a mere notice by a company, not followed up by entry or other proceedings, within the period limited for compulsory purchase, does not constitute such a contract as Equity will specifically enforce (f). In such a case the proper course for the landowner is by *mandamus* to compel the company to proceed with the other steps directed by their Act.

Notice must
be acted on
within reason-
able time.

But the notice given by the company to the landowner cannot operate for an indefinite time; it must be acted on within a reasonable period, or it will be deemed to have been abandoned. Thus, where a railway company, within

(b) *Furniss v. Midland R. Co.*, L. R. 6 Ex. 473.

(c) *Stamps v. Birmingham and Valley R. Co.*, 2 Ph. 678; 6 All. Ca. 123; and see *Simpson v. Lancaster and Carlisle R. Co.*, 15 Sim. 620.

(d) *Everfield v. Mid-Sussex R. Co.*, 1 Giff. 158; 3 De G. & Jo. 286; *Dodd v. Salisbury and Yeovil R. Co.*, *ib.* 158; *Cleway v. Mayor, &c. of London*, 4 T. 77; and compare *Simpson v. Wiltshire & Gloucestershire R. Co.*, 15 Ex. 473.

C. B. N. S. 731; *Webb v. Manchester, &c. R. Co.*, 4 M. & Cr. 118; *Flower v. London and Brighton R. Co.*, 2 Dr. & Sm. 330; *Att.-Gen. v. G. E. R. Co.*, L. R. 6 Ch. Ap. 572.

(e) *Dox v. London and Croydon Canal Co.*, 1 Ball. C. 257; *Reg. v. Birmingham R. Co.*, 15 Q. B. 604, 647, n.

(f) See *supra*, p. 210 note, (a), and *Regent's Canal Co., &c. v. Ware*, 23 Beav. 575; *Exminster C. Co. v. Shrewsbury, &c. R. Co.*, 3 K. & Jo. 672.

the time limited for the exercise of their compulsory powers, served notice on the landowner, but no agreement was entered into, and the time fixed by the Act for the completion of the line expired before any further steps were taken, the company was restrained from proceeding under the notice (g). And Lord Cairns seemed inclined to lay it down as a general rule, that where the time limited for the completion of the works has expired, the company can no longer exercise their compulsory powers of purchasing (h).

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If a defendant by his answer to the plaintiff's bill for specific performance, admits the parol agreement, but neglects to claim the benefit of the Statute, this will constitute a sufficient memorandum in writing to satisfy the Statute (i). So, too, an affidavit filed by the party to be charged (k); and his signature, though not alleged, will be presumed by the Court, as an affidavit must be signed before it is sworn (l).

Answer in a
Chancery suit
may be a
sufficient
memorandum.

And it is now well settled that a written agreement after, in pursuance of a parol agreement before, marriage, is a sufficient memorandum within the Statute (m).

Written
agreement
after, in
pursuance
of a parol
agreement
before,
marriage.
Rent rolls,
abstract, &c.,
insufficient;

But—and the case may be considered as exceptive from the first general rule—where B. had entered into a parol agreement to sell an estate to W., and B.'s agent made out and signed a rent-roll, entitled "Rent-roll of lands agreed to be sold by B. to W. from May 1762, at 21 years' purchase for the clear yearly rent," and the amount of the rent was then corrected by B. in his own handwriting, and the rent-roll so

(g) *Richmond v. North London R. Co.*, L. R. 5 Eq. 352; L. R. 3 Ch. Ap. 679; and see and consider *Pinchin v. London and Blackwall R. Co.*, 1 K. & Jo. 34; 5 De G. M. & G., 351; which see also as to the landowner's remedy in case of delay by the company; 1 K. & Jo. 69.

(h) *Richmond v. North London R. Co.*, L. R. 3 Ch. Ap. 681; and *vide infra*, Ch. XVII. s. 2, as to the re-

medy by *mandamus*.

(i) *Ridgway v. Wharton*, 5 De G. M. & G. 677; *Jackson v. Oglander*, 2 H. & M. 465; and *vide infra*, Ch. XVIII. s. 7.

(k) *Barkworth v. Young*, 4 Drew. 1.

(l) *Ib.*

(m) *Taylor v. Birch*, 1 Ves. Sen. 297; *Barkworth v. Young*, 4 Drew. 1; *Hammersley v. De Biel*, 12 Cl. & Fin. 64 n; and *infra*, Ch. XVIII. s. 7.

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Stat. 2.
and letters to
creditors; or letter
written as
an abandon-
ment.

Recital of
agreement,
held sufficient.

altered was delivered to W., and abstracts of title were also delivered, and B. sent letters to his creditors informing them of the sale, it was held, that there was no sufficient agreement (n); nor will a letter suggesting an abandonment of a parol agreement (o) take the case out of the Statute; but where, at Law, an agreement was produced in the following words, viz., "A. having agreed to purchase of B. for £250 the two leasehold houses situate, &c., B. hereby agrees to paper and paint, A. to pay £230 at the time of the contract, and the remaining £20 on the completion of the painting," the agreement to purchase, although recited as an existing agreement, was considered to form part of the agreement produced (p).

Petition for
investment
of trust
fund, and
order
directing
inquiries.

So a petition by a landowner, who was also tenant for life of a settled fund, praying that it might be invested in purchase of the land, and an order merely directing an inquiry as to whether the proposed purchase was a proper one, and as to the title, have been held not to constitute a binding contract as against the landowner; but the Court raised the question as to what would have been the effect of the order, had it gone on in the usual way to direct that if the purchase were a proper one and the title good, the sale should be carried into effect (q).

Document
relied on
must consist
with alleged
parol agree-
ment.

It is, of course, necessary that the letter or other document relied on should be consistent with the parol agreement set up by the party relying on it (r)

(n) *Whaley v. Baynel*, 1 Bro. P. C. 245 (the decision was upon the Irish Statute of Frauds, which corresponds with the English Act), *Coole v. Toombs*, 2 Anst 420; and see *Cass v. Waterhouse*, Prec. Ch. 29.

(o) *Gosbell v. Adair*, 2 Ad. & E. 600; *Fyson v. Kilmer*, 3 Q. L. R. 705; see *Towney v. Crispin*, 3 Bro. C. C. 161, 818, where the vendor being pressed to sign the agreement wrote that his word should be good as any security he could give, and was

held bound; but this seems to be bad law; see 1 Sch. & Lef. 34; *Maunsell v. White*, 1 J. & L. 567; and see 3 Ves. 713; and *Tanner v. Smart*, 6 B. & C. 603. See, too, *Pain v. Coombs*, 1 D. G. & Ja. 34; *Butcher v. Russell*, 8 Jur. N. S. 155.

(p) *Hall v. Batty*, 4 Man. & G. 410; see *De Perquet v. Page*, 20 L. J. Q. B. 28.

(q) *Shrewsbury v. Shrewsbury*, 18 Jur. 337.

(r) *Cosper v. Smith*, 15 East 108.

As to both parties being named:—it is stated to have been said by Lord Cowper (Lord Keeper), "that if a man being in company makes offers of a bargain, and then writes them down and signs them, and the other person then takes them up and prefers his bill, there will be a sufficient agreement" (s); and the dictum, which was extrajudicial, is cited by Lord St. Leonards (t): however, in *Boyce v. Green* (u), a memorandum in these words, "Sold 100 Mining Purdies at 17s. 6d." and signed by the vendor, was held insufficient, as not mentioning the name of the purchaser (x). So, in a modern case, a document in the following terms, "A. agrees to buy the whole of the lots of marble, purchased by B. at Lyme Cobb, at 1s. per foot," was held insufficient, because B.'s name as seller was not mentioned in it (y); but this decision has been disapproved; and in a later case, where J. W., a duly authorized agent of R, the seller made the following entry in the book of N. the buyer, "Mr. N. 32 sacks culasses at 39s. 280 lbs, to wait orders, J. W.," it was held that there was a sufficient memorandum in writing to satisfy the Statute; and that parol evidence was admissible to show that N. was a baker, and R. a dealer in flour (z). So, it has been held, that, in order to bind the purchaser by his own signature, either the name of the vendor must appear by the agreement or in the conditions or particulars thereby referred to, or the vendor, or the auctioneer, as his agent, must sign the agreement (a). Later cases have carried the rule still further; and it appears to be now clearly settled that, in order to satisfy the Statute, both parties should be specified, either nominally or by a sufficient description (b); and the reference must be unmistakeable.

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Whether
both parties
must be
named.

Result of
recent cases.

(s) *Coleman v. Upcot*, 5 Vin. Ab. 527.

(t) Sug. 181; it may be inferred from the report that the agreement in *Knight v. Orockford*, 1 Esp. 190, contained the plaintiff's name.

(u) Bat. 608.

(x) See *Seagood v. Meale*, Prec. Ch. 560; *Champion v. Plummer*, 1 Bos. & P. N. R. 354; and *Graham v. Musson*, 7 Ex. 49.

(y) *Wadenbergh v. Spooner*, L. R. 1

Ex. 316.

(z) *Newell v. Radford*, L. R. 3 Ex. 52; and see *Sari v. Bourdillon*, L. R. 196.

(a) *Wheeler v. Collier*, N. B. & M. 123; and see *Jacob v. Kirk*, 2 Moo. & R. 221.

(b) *Williams v. Luke*, 29 L. J. Q. B. 1; 6 Jur. N. S. 451, a case under the 4th section; *Williams v. Byrne*, 9 Jur. N. S. 368, a case under the 17th section.

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the mere description of one of the contracting parties as "your client," in a letter addressed to his solicitor, has been held insufficient (c). Thus, the usual memorandum signed by the auctioneer, and confirming the contract on behalf of "the vendor" is insufficient, if the vendor is not named or described in such memorandum, or in the particulars or conditions (d). But such a confirmation is sufficient if the particulars identify, although they do not name, the vendor; as where they describe him as "the executor of" A. B. (e). or even according to a very recent decision, where they merely state that the sale is "by direction of the proprietor" (f). Where, however, the agreement is wanting in the name of either of the parties, it may be supplied by any other writing connected with it (g). Notwithstanding the recent decisions, the vendor's name is seldom inserted in the agreement on a sale by auction: the omission may often lead to serious difficulty (h).

As to the names in the case of an agreement by letter.

In the case of a letter, if the name of the party to whom it is addressed appear in an indorsed direction, or be written at the foot of the letter, no difficulty on the above point can arise: if an envelope be used, the name may often not appear in the letter; but the Court, it is conceived, would receive evidence connecting the envelope with the inclosure (i).

Offer by letter, when binding.
Party accepting offer is not

A letter, it may be remarked, binds the writer from the time of the inception of its transmission; not of its receipt by the other party (k): and a person bound to accept or reject an offer by a particular post, and duly posting his

(c) *Skelton v. Cole*, 1 De G. & Jo. 587.

(d) *Patterson v. Duffield*, L. R. 18 Eq. 4.

(e) *Hood v. Lord Barrington*, L. R. 8 Eq. 218, but the first paragraph of the judgment cannot be relied on as sound law.

(f) *Sale v. Lambert*, L. R. 18 Eq. 1, see *supra*.

(g) *Warner v. Willington*, 3 Drew. 578. See also, 1 De G. & Jo. 586.

(h) See *Warner v. Willington*, and *Skelton v. Cole*, *ubi supra*; and *Smith v. Neale*, 2 Ch. B. N. S. 67; *War. N. S. 516*; *Reuss v. Pickley*, L. R. 1 Ex. 342.

(i) *Sart v. Bourdillon*, 5 W. R. 196.

(k) *Potter v. Sanders*, 6 Ha. 1; see *Herniman v. Gorton*, 5 Exch. 453, and compare *Wall's case* L. R. 15, Eq. 18.

letter, is not responsible for delay in the post-office (*l*); even although, by mistake, he date his reply a day in advance, so that, through such delay, the letter be delivered at a time apparently consistent with its erroneous date (*m*).

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liable for
delay in the
post-office.

A general description of the estate,—*e. g.*, “Mr. O.’s house” (*n*), or “my house” (*o*), or, “the property in Cable Street” (*p*), or, “the house in Newport” (*q*), or, “the intended new public-house at Putney” (*r*), or, “the premises” (*s*)—is sufficient, if parol evidence can be produced to show what property was intended: but if the property be described by reference to a plan or instrument, so vague as not to admit of a legal construction, the defect would, it is conceived, be fatal (*t*); so, an agreement to lease the “coals, &c.,” under specified closes, would seem to be too ambiguous to be enforced (*u*); but an agreement for a lease of a farm containing about 437 acres, “except 37 acres thereof,” which were not specified, was held capable of being enforced, the Court giving the lessee the right of selection (*v*); so an agreement to take a lease of all those two seams of coal, known as the two-foot coal and the three-foot coal, “lying under lands *hereafter to be defined* in the Bank End Estate,” was considered sufficiently definite, the true construction being that the boundaries of the whole estate were to be afterwards ascertained (*y*): so, the reservation in a contract of “the right to search for

General
description
of property
sufficient.

(*l*) *Adams v. Lindsell*, 1 B. & Ald. 681; *Duncan v. Topham*, 8 C. B. 225.

(*m*) See *Dunlop v. Higgins*, 1 H. L. C. 396; but see comments on this case in *British and American R. Co. v. Colson*, L. R. 6 Exch. 108, and see now *Wall’s case*, *ubi supra*, and generally on this subject Benjamin on Sales. *Quare*, where the receiver has done an irrevocable act upon the error into which he has been led by the blunder of the sender.

(*n*) *Ogilvie v. Foljamba*, 3 Mer. 61.

(*o*) *Cowley v. Watts*, 17 Jur. 172.

(*p*) *Blankley v. Smith*, 11 Sim. 150.

(*q*) *Owen v. Thomas*, 3 Myl. & K. 353; and see *Rose v. Cunyngame*,

11 Ves. 350, where the description of the property, as “the land I bought of Mr. Peters,” seems to have been sufficient; although, the terms of the purchase not appearing, it was held that there was no agreement.

(*r*) *Wood v. Scarth*, 2 K. & Jo. 33.

(*s*) *Id.*; and see *M’Murray v. Spicer*, 16 W. R. 332.

(*t*) *Monro v. Taylor*, 8 Ha. 51.

(*u*) *Price v. Griffith*, 1 De G. M. & G. 80; and see *Stuart v. L. & N. W. R. Co.*, 1 De G. M. & G. 721.

(*x*) *Jenkins v. Green*, 22 Beav. 437.

(*y*) *Hayward v. Cope*, 27 Beav. 140, *sed quare*.

and work mines, minerals," &c. (e), and the words "goodwill, &c." in a contract for the sale of a foundry (a), have been considered sufficiently free from ambiguity, to enable the Court to enforce specific performance.

But there must be some description.

And it is immaterial that the agreement does not distinguish the tenures of the several portions of the estate (b); or even the tenure of the whole estate if this can be shown to have been in the knowledge of both parties (c). But there must be some description of the property: e.g., a memorandum that a party has disposed of "his writings," (i.e., title deeds,) is insufficient (d).

The writing must fix all the terms of the agreement.

So, all the essential terms of the contract must be fixed; or, as in the case of the arbitration bond (e), the means of compulsorily fixing them must be provided: thus, a receipt for the deposit has been held insufficient to bind the contract, because it did not state either the price or what proportion the deposit bore to the price (f); so, an alleged partnership in a mine was held to be not sufficiently proved by receipts for sums of money on account of a share in the mine, though such sums were exactly a moiety of the rent (g); so, where the price was fixed subject to variation in respect of a rent-charge, and it did not appear whether the amount was 5s. or 1s. *per annum*, the defect was held fatal (h); so, where the agreement for "a lease" does not specify the intended duration of term, and nature of reservations (i);

(z) *Parker v. Taswell*, 2 De G. & Jo. 559.

(a) *Cooper v. Hood*, 26 Beav. 293.

(b) *Monro v. Taylor*, 8 Ha. 51.

(c) *Cowley v. Watts*, 17 Jur. 172.

(d) *Seagood v. Meale*, Prec. Ch. 560.

(e) *Supra*, p. 203, n. (h).

(f) *Blagden v. Braddell*, 12 Ves. 466; and see *Hart v. Wright*, 1 Atk. 13; *Stewart v. Longacre*, 5 B. & C. 583; *Oliver v. Cook*, 1 Sch. & L. 23;

Milnes v. Gory, 14 Ves. 400, 406; *Morgan v. Milman*, 17 Jur. 188; 2

De G. M. & G. 24.

(g) *Caddick v. Skidmore*, 2 De G. & Jo. 52.

(h) *Lord Middleton v. Wilson*, Sug. 185. But might it not be sufficient, if, in such a case, the plaintiff set off the agreement according to that alternative of construction which is least favourable to himself?

(i) *Cox v. Middleton*, 2 Dre. 209, 219; *Davis v. Jones*, 25 L. J. N. S. 6, P. 21; and see *Fitzmaurice v. Bayly*, 9 H. L. Ca. 78, where the lessee had ratified the contract.

so, where, on a sale of the surface, it was provided that a royalty of 6*d.* per ton should be paid for the minerals, and that the same if not worked should be paid for as if gotten; there being no means provided for ascertaining what quantity would have to be paid for (*k*): so a stipulation on the sale of a foundry that "a large portion" of the purchase-money was to be left in the business (*l*): so, upon a sale subject to conditions, the auctioneer's receipt or entry would be void, unless it were actually annexed, or clearly referred, to the conditions (*m*).

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Where there was an agreement for the sale at a specified price, and "20 per cent. upon any sum which the property might realize above that price" at a sale by auction, which was advertised to take place, and the vendor withdrew the property from the sale, it was held that there was a valid contract for purchase at the price specified, without the addition of any per-centage (*n*).

Agreement
for sale at a
specified
price plus
a share of
profits on
re-sale.

It appears probable that a general agreement to sell "at a fair valuation" may be enforced; and the Court will, if necessary, direct a reference to ascertain the price (*o*): but where the mode of valuation is specified, it must be strictly followed; for instance, where the price is to be determined by A. and B., or an umpire selected by them, and they fail to agree upon the price, or to name an umpire, the Court can

Price deter-
minable by
valuation, &c.

(*k*) *Williamson v. Wootton*, 3 Dre. 210.

(*l*) *Cooper v. Hood*, 26 Beav. 293.

(*m*) *Hinde v. Whitehouse*, 7 East, 558, 569; *Kensworthy v. Schofield*, 2 B. & Cr. 945; and see *Coles v. Trecothick*, 9 Ves. 234; Sug. 130; *Wood v. Midgley*, 5 De G. M. & G. 41; *Peiros v. Corf*, L. R. 9 Q. B. 210:

(*n*) *Langstaff v. Nicholson*, 25 Beav. 160.

(*o*) See *Milnes v. Gery*, 14 Ves. 400, 407; *Lord Lonsdale v. Gaskarth*, cited 13 Ves. 108 (where the decree seems, however, to have been by

consent); *Gregory v. Mighell*, 18 Ves. 328, 334; *Pritchard v. Ovey*, 1 Jac. & W. 396; *Price v. Asheton*, 1 Y. & C. 82, 441; *Potts v. Thames Haven Co.*, 15 Jur. 1004, V.-C. P.; *Morgan v. Milman*, 17 Jur. 193; 3 De G. M. & G. 24; Dav. Conv. 1, 538; *et contrâ*, *Gourlay v. Duke of Somerset*, 19 Ves. see p. 430; *Agar v. Macklev*, 2 Sim. & St. 418; *Logan v. Le Mesurier*, 6 Moo. P. C. 132. Where such an agreement was made a rule of Court under a consent clause, the Queen's Bench refused to grant an attachment: *Re Hemmington*, 15 Q. B. 205, n., see 509.

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give no relief (p): so, as a general rule, if it is to be settled by arbitration (q). It has even been held that, in the latter case, the terms of the award must, unless there be an agreement to the contrary, be settled while both parties are living, as the death of either revokes the power of the arbitrators or umpire (r): but, in the reported case, a stipulation that the award should be delivered to the parties (not naming their representatives) by a specified day, seems to have been considered to indicate an intention merely to delegate a personal authority: and there was a different decision in an earlier case in Equity, where (such stipulation being wanting) the general facts were very similar (s). Where, however, it is not of the essence of the contract that the value should be fixed by arbitration, the Court may, it seems, enforce the agreement and if necessary ascertain the price (t).

Agreement
to take fix-
tures at a
valuation.

A distinction has been properly drawn between an agreement that the price of the property itself shall be settled by a valuation, and an agreement, upon the sale of buildings at a specified price, that certain plant and machinery shall be taken at a valuation (u). In one case (x), V.-C. Kindersley refused to enforce specific performance of a contract to purchase the lease and goodwill of a public house at a specified price, and the stock and fixtures at a valuation: but, in a

(p) *Milnes v. Gery*, *ubi supra*; and see *Coth v. Jackson*, 6 Ves. 12, 34; *Gourlay v. Duke of Somerset*, 19 Ves. 431; *Collins v. Collins*, 26 Beav. 306; and see *Scott v. Corp'n. of Liverpool*, 3 De G. & Jo. 334, 367; *Scott v. Avery*, 5 H. L. Ca. 811; *Vickers v. Vickers*, L. R. 4 Eq. 529; and see *Houghton v. Bankart*, 3 De G. F. & Jo. 16; a case of improper interference by the Court with the arbitrator's authority.

(q) *Morgan v. Milman*, 17 Jur. 196; 3 De G. M. & G. 24, 35; *Darby v. Whitaker*, 4 Drew. 134; *Tillett v. Charing Cross R. Co.*, 26 Beav. 419.

(r) *Blundell v. Brettarch*, 17 Ves. 232, 242.

(s) *Belchier v. Reynolds*, 2 Ken. pt. 2, 87.

(t) *Dinham v. Bradford*, L. R. 5 Ch. Ap. 519.

(u) *Jackson v. Jackson*, 1 Sm. & G. 184; see *Cumberland v. Bowes*, 3 C. & R. 149, as to meaning of "a fair valuation" on contract for sale of farming stock.

(x) *Darbey v. Whitaker*, 4 Drew. 134, *sed quæritur* *Jackson v. Jackson*, does not seem to have been cited; see comments on these cases in *Richardson v. Smith*, L. R. 5 Ch. Ap. 648, 652, 654.

later case, where the contract fixed the price for the estate and provided that the purchaser should take certain furniture and chattels at a valuation to be made by valuers to be mutually agreed upon, and the vendor refused to appoint a valuer or to complete the sale, the Court of Appeal, affirming V.-C. Stuart, considered that the clause providing for the purchase of the furniture, &c., was merely a minor and subsidiary part of the agreement, and not, as in *Darbey v. Whitaker*, of the essence of the bargain, and decreed specific performance of the contract, except so far as it related to the personal chattels (y). In all cases where such is the intention of the parties, the contract should clearly show that it can be specifically enforced, so far as it relates to the land, without reference to the fixtures or articles which are to be taken at a valuation. The agreement ought to provide that, in the event of a valuation not being made in the mode specified, the fixtures, &c., shall be taken at their fair value (z).

By the 12th section of the Common Law Procedure Act, 1854 (a), it is enacted, that if, in any case of arbitration, the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator, or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, or if any appointed umpire or third arbitrator refuse to act or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one, then—after notice and default, as

As to arbitration under the Common Law Procedure Act, 1854.

(y) *Richardson v. Smith*, L. R. 5 Ch. Ap. 648.

(z) *Vide supra*, p. 221, n. (o).
(a) 17 & 18 Vict. c. 125.

therein mentioned—a judge of any of the Superior Courts of Law or Equity may appoint an arbitrator, umpire, or third arbitrator, as the case may be, who shall have the same power of acting in the reference, and of making an award, as if he had been appointed by the consent of all parties. It has been decided that these provisions are retrospective, and that they apply not only to references authorized by any document, but also otherwise, as by Act of Parliament, or by parol (b). Where there was a contract for purchase at a price to be ascertained by two valuers, or their umpire, and the valuers could not agree in the nomination of an umpire, Lord Romilly held that the matter was one merely of appraisal, and not of arbitration, and that he had no power under the Act to interfere (c); and this decision has been approved and followed in a recent case at Law, where it was held that a misstatement as to rental in the particular, though a proper subject for compensation within the conditions, was not a difference which might be referred to arbitration under the Act; and that neither party could, under section 13, appoint his own nominee as sole arbitrator (d). But the cases of *Collins v. Collins*, and *Bos v. Helsham* must not be taken to comprehend every case of compensation or value. Thus, where, in order to ascertain the value of the property, or the amount of compensation to be awarded, the matter assumes the character of a judicial enquiry, as *e.g.*, where the valuers have to adjudicate upon a point of law, or a question of right between the parties, arising out of the fact, the matter ceases to be a simple valuation, and may properly be considered as one of arbitration (e).

Where the submission has been

By the 17th section of the Common Law Procedure Act 1854 (17 and 18 Vict. c. 125,) it is provided that when in

(b) *Re Lord*, 1 K. & Jo. 90; see, however, *Disham v. Bradford*, L. R. 3 Ch. Ap. 519.

(c) *Collins v. Collins*, 26 Beav. 305; see too, *Leach v. Berryman*, 18 East, 1; *Lee v. Hemmings*, 15 Q. B. 305.

(d) *Bos v. Helsham*, L. R. 2 Ex. 72.

(e) *Re Rogers*, L. R. 2 Q. B. 367; *Re Anglo-Mexican Bank*, ib. 452; see too, *Pickers v. Pickers*, L. R. 4 Eq. 595, 605.

any case the document authorizing the reference is, or has been, made a rule or order of any of the Superior Courts of Law or Equity, no other of such Courts shall have jurisdiction to entertain any motion respecting the arbitration or award; but it has been held that this provision does not oust the jurisdiction of a Court of Equity to entertain a suit for the specific performance of the award; although the submission has been made a rule of one of the Superior Courts of Common Law (*g*).

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made a rule of court, specific performance of the award may still be enforced.

It is not necessary that the terms should appear on the face of the instrument signed by the party to be charged; which, when an agreement has to be made out from correspondence, is seldom the case: it is sufficient if the instrument refer to other documents (such as conditions of sale, previous letters, or, in fact, any other writings), which contain the terms (*h*).

Reference to other documents containing terms is sufficient.

Such writings, however, must clearly be referred to (*i*); and, unless their entire contents are to form part of the agreement, it must distinctly appear what is, and what is not, to be so included: *e. g.*, where the signed writing referred to such of the clauses contained in a specified paper as had been read at a meeting between the parties, not stating which had been so read, it was held bad for uncertainty (*k*).

If reference is clear.

It will be remarked (*l*) that in the last case, there was a

Patent ambiguity

(*g*) *Blackett v. Bates*, 2 H. & M. 610, reversed on appeal, but on other grounds, 1 L. R. 1 Ch. Ap. 117; and compare *Smith v. Whitmore*, 1 H. & M. 576; but see sect. 11 of the Act.

(*h*) *Clinan v. Cooke*, 1 Sch. & L. 22, 33; *Allen v. Bennett*, 3 Taunt. 169; *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Laythorpe v. Bryant*, 2 Bing. N. C. 735; *Blagden v. Bradbear*, 12 Ves. 471; *Verlander v. Codd*, Turn. & R. 357; *Ridgway v. Wharton*, 3 De G. M. & G. 677, 697; 6 H. L. C. 238, and Lord Cranworth's judgment.

Compare *Peirce v. Corf*, L. R. 9 Q. B. 210 where the documents, not being connected together, were held insufficient to constitute an agreement.

(*i*) *Bogdell v. Drummond*, 11 East, 142; *Boyce v. Greene*, Bat. 608; *Jacob v. Kirk*, 2 Moo. & R. 221; *Price v. Griffith*, 1 De G. M. & G. 80; *Ridgway v. Wharton*, *ubi supra*.

(*k*) *Brodie v. St. Paul*, 1 Ves. jun. 326, 333; see 1 Sch. & L. 36; but see as to uncertainty where there has been part performance, *Vouillon v. States*, 2 Jur. N. S. 848.

(*l*) See 1 Sch. & L. 36.

Chas. F.L.
and defective
reference
distinguished.

Parol
evidence
admissible to
explain
imperfect
reference.

General
reference
to other
instrument
sufficient.

defect patent on the face of the agreement: the agreement itself, according to its own grammatical construction, raised the question as to which of the clauses were intended: but, in the case of a mere imperfect reference to another instrument, parol evidence is admissible to ascertain its identity (m); so, parol evidence is admissible to explain the sense in which words, in themselves unintelligible, were used by the parties (n); or the peculiar meaning which local, professional, or trade usage has attached to particular expressions (o); or to prove the existence, at the date of the agreement, of facts material to its construction (p).

And it appears that, at least in the case of letters, there need not be any specific description of, nor even an *express* reference to, the prior documents; it will be sufficient if the Court be clearly satisfied that a reference was in fact intended, and of the identity of the instrument.

For instance, where (q) A., the owner of W. farm, on the 5th July wrote a note in the third person to B., informing him that C. had made an offer for the farm, at a specified price, but that, if B. chose to have it at that price, C. would decline the purchase in his favour; B., it was alleged, wrote a note in reply, accepting the offer, but such note was not forthcoming: on the 11th July A. wrote to B., "I have just received yours; and am glad you have determined to purchase the W. farm: I will write to C. to inform him you have agreed to purchase the estate;"—Sir William Grant, relying on the words "determine" and "agree," as denoting an acceptance by B. of a previous proposal by A., instead of, as might have been the case, an independent offer by B., considered that the letter of the 11th was sufficiently con-

(m) See *Oliver v. Cooke*, 1 Sch. & L. 33; *Saunders v. Jackson*, 2 Bos. & P. 233; and see *Jackson v. Oglander*, 3 H. & M. 485, 472; *Bolokow v. Seymour*, 17 C. B. N. S. 107; *Ridgway v. Wharton*, 6 H. L. Ca. 238; 27 L. J. Ch. 46.

(n) *Sweet v. Lee*, 3 Mann. & Gr.

452.

(o) *Vide infra*, Ch. XVII.

(p) *Monro v. Taylor*, 3 Ha. 56.

(q) *Western v. Russell*, 3 Ves. & B. 167.

nected with the note of the 5th, to show that A. agreed to sell upon the terms of that note: and specific performance was decreed accordingly.

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So, upon a sale of goods, a subsequent letter written by the purchaser, and containing the following expressions, "The tobacco I want immediately forwarded; I likewise want the invoice of the rice and other tobacco," was held to be sufficiently connected with the previous entries of sale of the articles in the vendor's order book (r).

So, a letter from the purchaser's solicitor to the vendor's solicitor, merely headed with the names of their respective clients, and undertaking personally to settle the purchase in two months, if that would be satisfactory, has been held to be a contract binding the solicitor (s).

But where the plaintiff in a bill for the specific performance of an alleged parol contract to take a lease of a house relied on a letter written by the defendant, in which the latter agreed to take the house for seven years on specified terms, but did not fix any date for the commencement of the lease, and on another letter written by the defendant, in which the date of commencement was supplied and further terms were added to which the plaintiff did not agree, it was held that there was no memorandum sufficient to satisfy the Statute (t).

So, also, a reference in a signed document to "the agreement which your client alleges he has entered into" has

(r) *Allen v. Bennett*, 3 Taunt. 169; and see *Morgan v. Holford*, 1 Sm. & G. 101; and compare *Peirce v. Corf*, L. R. 9, Q. B. 210; and as to connecting one letter with another, although there is no express reference, *Verlander v. Codd*, Turn. & R. 352; *Greene v. Cramer*, 2 Con. & L. 54; *Skinner v. M'Donnell*, 2 De G. & S. 265; *Hamilton v. Terry*, 11 C. B. 954; *Fyson v. Kelson*, 3 C. L. R. 705;

Alcock v. Delay, 4 El. & B. 660; *Warner v. Willington*, 3 Drew. 523; *Wood v. Scarth*, 2 K. & Jo. 33; *Baumann v. James*, L. R. 3 Ch. Ap. 508; but see *Skelton v. Cole*, 1 De G. & Jo. 587.

(s) *Powers v. Fowler*, 4 El. & B. 511.

(t) *Nasham v. Selby*, L. R. 13 Eq. 191; *affd.* L. R. 7 Ch. Ap. 406.

been held insufficient (x); so, too, a letter signed by the party to be charged, and containing the following passage, "Previously to paying the amount (then followed an illegible word) for tithes and glebe, it would be advisable to have some information as to title."

Tests of
sufficiency
in cases of
correspond-
ence.

In cases of correspondence the difficulty generally is, to determine whether there has been a concluded agreement or merely a treaty (y); as to which the following rule seems deducible from the authorities.

It must
contain a
clear accep-
tion by both
parties to the
same terms.

If the original offer leave nothing uncertain on the face of it (y), and be met by a simple acceptance, the treaty is, of course, concluded; but if the original offer leave anything to be settled by future arrangement, it is merely a proposal to enter into an agreement (z): so if the reply be either more or less than a simple acceptance, the variation must be acceded to by the original proposer; or there is no agreement (u): and this state of things will continue, until there is, upon the face of the correspondence, "a clear accession on both sides to one and the same set of terms" (b).

Where on
simple
acceptance
a formal
agreement is
required.

Where, however, there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not

(u) *Jackson v. Oglander*, 2 H. & M. 465. See, too, *Stelton v. Cole*, 1 De G. & Jo. 547, and *supra*, p. 218.

(x) See *Huddleston v. Briscoe*, 11 Ves. 583, 591; *Stratford v. Bosworth*, 2 Ves. & B. 341, 345; *Ogilvie v. Foljambe*, 3 Mer. 53; *Archer v. Baynes*, 5 Exch. 625.

(y) *Honeyman v. Marryat*, 1 Jur. N. S. 857; *supra*, v. 14; 6 H. L. C. 312.

(z) *Marchioness of Ely*, 6 H. L. C. 312; *supra*, v. 14; 6 H. L. C. 312; *Wood v. Wood*, 2 H. & M. 2; *Wood v. Wood*, 3 De G. & Jo. 547; *Wood v. Wood*, 5 De G. & Jo. 547.

(a) *Holland v. Eyre*, 2 Sim. & S. 194; *Smith v. Barnum*, 9 B. & C. 569; *Heyward v. Barnes*, 23 L. T. 68.

(b) 1 Coll. 312; and see *Cowley v. Watts*, 17 Jur. 172; *Chapley v. Fuller*, 13 C. B. 123; and as to an immaterial addition to an acceptance, *Glire v. Beaumont*, 1 De G. & S. 397; *Giddins v. North*, 11 Metropolitan Asylum Directors, 11 B. & W. 1. As to a special acceptance required by the terms of the original offer, see *Boys v. Boys*, 6 Mees. 218; *Taylor v. Portman*, 1 H. & M. 1057; 7 De G. M. & G. 591.

prevent the Court from enforcing the final agreement so arrived at (c). But if the stipulation as to a formal contract is a term of the assent, leaving it open to the acceptor or his solicitor to qualify the assent by special conditions, then until those conditions are accepted, there is no final agreement, such as the Court will enforce. Thus, where the vendors of land, in a letter acknowledging the receipt of an offer to purchase, wrote as follows to the intending purchasers, "Which offer we accept, and now hand you two copies of conditions of sale which we have signed. We will thank you to sign same and return one of the copies to us," and the conditions were of a special character, which the purchasers refused to assent to, it was held that the acceptance was simply conditional, and a demurrer to the vendors' bill for specific performance was allowed (d). So where an intending lessee, in reply to a letter from house-agents furnishing particulars and terms of two residences, wrote, "I have decided on letting No. 22, Belgrave-road, and have spoken to my agent, Mr. C., of, &c, who will arrange matters with you, if you will put yourselves in communication with him;" it was held that there was no contract (e).

An offer in writing may be accepted by parol, or by the acts of the other party; and if the proposal in writing is signed by the party to be charged, and there is a parol acceptance by the party to whom it is made, there is a sufficient memorandum within the 4th section of the Statute of Frauds (f).

A written offer may be accepted by parol.

It has been held that conditions of sale used at the putting up of an estate by auction, cannot be considered as impliedly incorporated with an unconditional offer by letter to purchase the property, subsequently made by a person who attended

Conditions of sale - whether impliedly incorporated in contract.

(c) *Per* Sir G. Jessel, M. R. in *Crosley v. Maycock*, L. R. 18 Eq. 180, 181; and see judgment of Lord Westbury in *Chinnock v. Marchioness of Ely*, 6 N. R. 3.

(d) *Crosley v. Maycock*, L. R. 18 Eq. 180; and see cases cited in note (3); and *Ridgway v. Wharton*, 6 H. L. C.

264, 288, 806.

(e) *Stanley v. Dowdencell*, L. R. 10 C. P. 102.

(f) *Reuss v. Pickley*, L. R. 1 Ex. 342; and see *Warner v. Willington*, 3 Drew. 523; *Benecke v. Chadwick*, 4 W. R. 687; *Horsfall v. Garnett*, 5 W. R. 387.

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the action (*g*); but the case is different, for the purpose of defence in Equity, where the parol negotiation has proceeded upon the footing of the conditions (*h*).

Effect of
conditional
acceptance.

Where the defendant wrote at the foot of an agreement for an underlease, "I have no objection to this agreement supposing that there is nothing unusual in Sir R.'s (the ground landlord) leases, which I presume there is not;" and then, before the agreement with this variation has been acceded to by the other party, withdrew his offer; and it was contended that, inasmuch as the covenants were usual, he still remained bound; Sir J. Wigram, V.-C., admitting that a case might exist in which the distinction between the original and altered agreement must be treated as plainly nugatory, held, that the case before him could not be considered as of that character, merely because the Court might, upon argument, decide that the covenants were not unusual (*i*).

Offer may
be with-
drawn before
acceptance.

For, it may be observed, that an original offer, or, it is conceived, any subsequent proposal which does not amount to a simple acceptance of the terms of the other party, may be withdrawn or varied (*k*) at any time before it is accepted; even although a time be named for its acceptance (*l*). and it is revoked by the death or bankruptcy of the proposer before acceptance (*m*) and that if rejected, either by an express refusal, whether written or verbal (*n*), or a proposed variation either as to time for giving possession, or price, or payment of deposit, or it is conceived, in any other particular, it at once ceases to be binding (*o*): and the acceptance of an offer must

If rejected,
etc., it ceases
to be bind-
ing.

Must be
accepted

(*g*) *Cowley v. Watts*, 17 Jur. 172.

(*h*) See *Ogilvie v. Foljamba*, 3 Mer. 53.

(*i*) *Lucas v. James*, 7 Ha. 410; see cases referred to in note (*b*); *Warner v. Wittington*, 3 Drew. 523; *Smith v. Nais*, 2 O. B. N. S. 67.

(*k*) *Hensman v. Marryat*, 1 Jur., N. S. 357; 21 Bear. 14; 6 H. L. Ca. 112; *Chinnock v. Marchioness of Ely*, 4 N. S.

(*l*) *Routledge v. Grant*, 4 Bing. 653; *Martin v. Mitchell*, 2 Jac. & W. 428; *Lucas v. James*, 7 H. 410.

(*m*) *Maynall v. Cursons*, 1 Jur. N. S. 737.

(*n*) *Sheffield Canal Co. v. Sheffield and Rotherham R. Co.*, 3 Rail. C. 121, R.; *Hensman v. Marryat*, *ubi supra*.

(*o*) *Routledge v. Grant*, 4 Bing. 653; *Hyde v. Wright*, 3 Bear. 334; *Thornbury v. Spill*, 1 Y. & C. C. C. 554.

be given within a reasonable time (p): if, however, a person make an offer by post, he cannot retract it, if the other party, before receiving any notice of withdrawal, return an immediate acceptance (q).

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within
reasonable
time.

Although where an agreement is signed *animo contrahendi*, parol evidence is not admissible to vary its terms, yet such evidence may be admitted to show that the signature was merely conditional, and that the agreement was intended to operate only on the happening of certain contingencies (r).

Parol evidence
admissible to
prove that the
agreement
was con-
ditional.

A writing which is signed by either party, and is perfect as respects the terms of the contract, will not be considered otherwise than final from the mere fact of its having, with the consent of the other party, been sent to a solicitor as instructions for the preparation of a more formal instrument (s).

Memorandum
binds,
although
sent as
instructions
for formal
agreement.

Any error, obviously clerical, in an agreement, will be corrected by the Courts (t).

Clerical
error.

(4.) *As to the signature.*

Section 4.

It has been long settled that a party signing an agreement is *prima facie* bound by it, although it be not signed by the other party (u); but if only one be bound, he may, it would

As to the
signature.

Signature
by party
charged
sufficient.

(p) *Kennedy v. Cox*, 3 Mer. 454; *Thornbury v. Bevil*, 1 Y. & C. C. C. 554, 563; *Williams v. Williams*, 17 Beav. 213; and see *Powers v. Fowler*, in error, 4 El. & B. 519; *Meynell v. Surtees*, 1 Jur. N. S. 737.

(q) See *Dunlop v. Higgins*, 1 H. L. C. 400; *Potter v. Sanders*, 6 Ha. 1.

(r) *Pym v. Campbell*, 2 Jur. N. S. 641; 6 El. & Bl. 370; *Wake v. Harrop*, 7 Jur. N. S. 710.

(s) *Fowle v. Freeman*, 9 Ves. 354; *Morgan v. Holford*, 1 Sm. & G. 101. See *Gibbins v. N. E. Metropolitan District Asylum*, 11 Beav. 1; *Card*

v. Jaffray, 2 Sch. & Lef. 374; and see judgment in *Crossley v. Maycock*, L. R. 18 Eq. 180; *Ridgway v. Wharton*, 6 H. L. C. 238, 264, 288, 306.

(t) See *Wilson v. Wilson*, 5 H. L. C. 40; *Hart v. Talk*, 2 De G. M. & G. 300.

(u) *Selton v. Slade*, 7 Ves. 265; 2 Wh. & Tnd. L. C. 429; *Lord Ormond v. Anderson*, 2 Ba. & B. 371; *Field v. Boland*, 1 Dru. & Wal. 37; Sug. 129; *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Fowle v. Freeman*, 9 Ves. 354; *Weston v. Russell*, 3 Ves. & B. 187, 192; *Owen v. Thomas*, 3 Myl. & K. 353; *infra*, Ch. XVIII.

appear, require the other to signify in writing his assent to or dissent from the contract; and unless this be acceded to, he may himself rescind it (x).

What
signature
sufficient.

A signature printed, or stamped, instead of written, or by initials, may be binding (y); but a mere description, although it satisfactorily identify the party, *e.g.*, "your affectionate mother," subscribed to a letter addressed to the son, with his name and address in full, has been held insufficient (z).

Signature to
instructions
for telegram.

In a late case, where there was a written offer to purchase to which the vendor replied by telegram "your offer for the L estate is accepted," it was considered by the Court, though it was not necessary to decide the point, that the signature of the vendor to the instructions for the telegram was a sufficient signature within the statute (a).

In pencil.

And it appears that an agreement is not the less binding by reason of the alterations and signature being in pencil instead of ink (b).

By married
woman in
surname of
deceased
husband.

The Ecclesiastical Courts have held a signature to a will by a woman, twice married and then under coverture, in the surname of her first husband, sufficient (c).

Signature
by agent.

And a signature in the name of an agent will bind the principal if the agency be established (d); and the alleged agent might, even before the late Evidence Act (e), be examined either to prove (f) or disprove the agency; but if his

(x) 2 Jac. & W. 428; see *Lord Ormond v. Anderson*, 2 Ba. & B. 371; and *Williams v. Williams*, 17 Beav. 218, 216.

(y) *Seanderson v. Jackson*, 2 B. & E. 238; *Schneider v. Norris*, 2 M. & E. 286; *Phillimore v. Barry*, 1 Camp. 518; *Scott v. Lee*, 3 Mann. & Gr. 452; and see *Blair v. Sutton*, 3 Mer. 245.

(z) *Sally v. Sally*, 3 Mer. 2; and see *Stanton v. Carr*, 1 De G. & J. 527.

(a) *Godwin v. Francis*, L. R. 5 C. P. 295.

(b) *Lucas v. Lucas*, 7 Ha. 410; *Geary v. Phelan*, 5 I.R.C. 254.

(c) *In the goods of R. Glover*, 11 Jur. 1022.

(d) *White v. Freeman*, 4 Taunt. 809; *Kennedy v. Kennedy*, 5 B. & C. 245.

(e) 14 & 15 Vict. c. 99.

(f) See *Stanton v. Carr*, 2 Nev. & P. 529; 1 De G. & J. 30.

evidence go to impeach the validity of the authority under which he has professed to act, it will be received with the most anxious jealousy (g).

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The signature to formal agreements, is of course, usually found at the end of the document; but the Statute requires only a *signing*, and not a *subscribing*; and the signature may, as in the case of a letter or agreement in the third person, be inserted in the beginning or any other part of the instrument, if inserted so as, in effect, to authenticate the entire document, and not to be exclusively applicable to particular portions (h); or, in other words, if it be so placed as to show that it was intended to relate to, and that it does, in fact, relate to every part of the instrument (i); and this according to some authorities, although, in the case of an agreement in the third person, a place be left for signature at the bottom, in the usual way (k): however, in a case, where the agreement contained the names of the parties in the commencement, and concluded with the word, "as witness our hands," without being followed by any name or signature, the Court took a more common-sense view of the question, and held that there was no sufficient signature (l); so where A., intending to marry B., wrote a paper commencing thus, "In the event of a marriage between the undermentioned parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon;" and then followed the terms of a proposed settlement, but the name of neither party was signed to the memorandum, it was rightly held that A.'s name, occurring in particular portions of the instrument, could not, by force of the words "undermentioned parties" be fastened on to the introductory words, so as to constitute

Signature not necessarily placed at end of agreement.

Effect of leaving blank for signature.

Where the name is inserted in the body of the agreement.

(g) *Howard v. Brathwaite*, 1 Ven. & B. 202, 209.

(h) *Saunderson v. Jackson*, 2 Bos. & P. 238; *Marrison v. Turnour*, 18 Ven. 175; *Western v. Russell*, 3 Ven. & B. 187; *Ogilvie v. Foljambé*, 3 Mer. 53; *Probert v. Parker*, 1 Russ. & M. 625; *Boschley v. Smith*, 11 Sim. 150; *Lobb v. Stanley*, 5 Q. B.

574; *Stokes v. Moore*, 1 Cox 219; Sug. 135.

(i) Per Lord Westbury, in *Caton v. Caton*, L. R. 2 E. & Ir. Ap. 143.

(k) *Saunderson v. Jackson*, 2 Bos. & P. 239.

(l) *Hubert v. Treherne*, 3 Mann. & G. 743; *Hubert v. Turner*, 4 Bos. & N. R. 434.

Class VI.
Back.
 a sufficient signature (m). The purchaser's signature on the back of the printed particulars (n), or in a column left blank in them for that purpose, may be sufficient (o).

Party bound
 by signature
 as witness :

but not as
 attesting
 witness.

And although a principal or his agent sign merely as a witness, he may be bound, if the signature amount to an acknowledgment of the existence of the agreement; *e. g.*, "witness A. B." (p): but where a person, whose formal signature would have bound the vendor, merely attested the execution of the agreement by the purchaser, this was held to be insufficient (q).

Approval of
 draft agree-
 ment or
 conveyance,
 whether
 sufficient.

The written approval by a professional agent, of a draft agreement, or of the draft conveyance which recites the agreement, will, it would seem, be insufficient (r), the signing being *alio intuitu*; this, however, was much questioned in a modern case (s), which was eventually decided on a collateral point: but in a later case, the written approval of the draft conveyance by the professional agent, was held insufficient, there being no proof that he had his client's authority to sign an agreement (t): the effect of a similar approval of a draft agreement by one of the parties, is more doubtful (u): it was held sufficient in a modern case, in which, however, the earlier authorities do not appear to have been cited (v). The circumstances of the party signing such approval being in the

(m) *Caton v. Caton*, L. R. 1 Ch. Ap. 137.

(n) See and consider *Hodgson v. Le Bret*, 1 Camp. 233; *Phillimore v. Barry*, *ibid.* 518; and as to bought and sold goods, *Goom v. Aftalo*, 6 B. & C. 117; and *Sivewright v. Archibald*, 15 Jur. 947, Q. B.; 20 L. J. 529, where the earlier cases are reviewed.

(o) *Emmerson v. Heelis*, 2 Taunt. 38.

(p) *Welford v. Beasley*, 3 Atk. 504; *S. C.*, 1 Ves. 8. 7; 9 Ves. 284, 251; see *Symons v. Symons*, 6 Maid. 207.

(q) *Gosbell v. Archer*, 2 Ad. & E. 500. As to whether attesting the execution of a deed is itself notice,

see Sug. 780, 781.

(r) See Sug. 140; *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 131; *Lord Townshend v. Bishop of Norwich*, 1 Rep. H. & W. by Jac. 308, n.; *Jackson v. Oglander*, 2 H. & M. 472.

(s) *Thorburn v. Bevil*, 1 Y. & C. C. C. 554; and see *Card v. J. Gray* 2 Sch. & Lef. 274.

(t) *Forster v. Woodland*, 7 Jur. N. S. 998; 7 H. & N. 103.

(u) See Sug. 141; *Doe v. Pedgriph*, 4 Car. & P. 312; *Farber v. Smith*, 1 Oell. 606; and compare *Shippey v. Darriren*, 5 Nap. 190.

(v) *Robino v. Martin*, 22 L. J. Ch. 502, M. K.

legal profession would, it is conceived, be unfavourable to the sufficiency of the signature. The alteration of the draft conveyance by one of the parties has been held insufficient: upon the case (y) as reported, it does not appear that the alterations comprised the name of the party making them; and the only ground for contending for the sufficiency of the instrument would be, that, by making the alteration, he had adopted such part of the draft, including the name, as he had left unaltered. In *Ithel v. Potter* (z), there was a similar decision, where the entire conveyance had been written by the defendant; but it does not appear whether the conveyance recited the agreement, although such, probably, was the case. Where the draft of a lease had, in pursuance of a parol agreement, been forwarded to the intended lessee for perusal, and he indorsed and signed a memorandum upon it, requesting the lessor to endeavour to relet the premises, as it would be inconvenient for him (the lessee) to perform his agreement, this was held to be sufficient (a).

A contract by a corporation aggregate, must, as a general rule (b), be under their common seal (c): but, by the Companies Clauses Consolidation Act, 1845, any contract entered into on behalf of a company coming within the provisions of the Act, and which, if made between private persons, would require to be in writing, and to be signed by the parties to be charged therewith, may be made, varied, or discharged in writing, signed by any two of the directors (d): and the

Signature
by public
companies,
&c.

(y) *Hawkins v. Holmes*, 1 P. Wms. 770; and see *Stokes v. Moore* 1 Cox, 219.

(z) 1 P. Wms. 771.

(a) *Shippey v. Derrison*, 5 Esp. 190.

(b) Ordinary business contracts by trading corporations form an exception from the rule. *Henderson v. Australian R. M. & N. Co.*, 3 C. L. R. 1181.

(c) See *Corp. of Ludlow v. Charlton*, 6 M. & W. 815; *Cope v. Thames Haven Co.*, 8 Exch. 841; 6 Rail. C. 88; *Diggle v. London and Blackwell*

R. Co., 5 Exch. 442; *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137; *Jackson v. N. Wales R. Co.*, 1 H. & Tw. 75; *Mayor, &c., of Kidderminster v. Hardwick*, L. R. 9 Q. B. 13; *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91.

(d) 8 Vict. c. 16, s. 97; see *Love v. London and N W. R. Co.*, 21 L. J., Q. B. 361. See 19 & 20 Vict. c. 47, sect. 41; and see now as to companies under the Companies Act, 1862; 30 & 31 Vict. c. 131, sect. 37; and *vide suprà*, p. 175.

same rules which apply to an original contract apply to any variation or alteration of it (e). In cases which fall within the general rule, the omission of the common seal precludes the company, while the contract is still executory, from suing, as it relieves them from being sued, upon it (f): but where there has been part performance, in which the company have acquiesced, an unsealed contract may in Equity be enforced against them (g); and even at Law, the absence of a sealed contract will not prevent the company from being sued, if they have accepted and adopted it (h).

Alteration
or correction
of agree-
ment.

We may here observe, that any alteration made by either party in a material part of a written contract, without the consent of the other party, destroys the rights under the contract of the party making the alteration (i): but an alteration made with consent is binding; and although it is prudent and usual to authenticate the alterations by a marginal signature, either in full name or by initials, this precaution seems to be not absolutely necessary: in fact it has been held that a memorandum written across the face of the signed agreement, and correcting an error in one of its terms, binds the writer although he do not sign it; and that the agreement thus corrected is valid under the Statute of Frauds (k).

Section 5.

(5) As to the stamps.

As to the
stamps.

As to stamps
on agree-
ments.

The agreement, if under seal, is a deed, and chargeable with duty as such (l): if not under seal, and if the subject-

(e) *Williams v. Chester and Holyhead R. Co.*, 15 Jur 828, Exch.

(f) *Governor of Copper Miners v. Fox*, 16 Q B 229.

(g) *Crook v. Corporation of Seaford*, L. R. 19 Eq. 678; affd. on this point, L. R. 8 Ch. App. 551.

(h) *Clarke v. Cuckfield Union*, 21 L. J., Q. B. 349; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; see, too, *Reading v. The Electric Telegraph Co.*, 3 Jur. 2, 2, 1245; and see report,

p. 175, where the cases are more fully considered.

(i) *Powell v. Dwyer*, 15 East, 29; *Davidson v. Cooper*, 18 M. & W. 343; *Mollett v. W. & A. Bartlett*, 5 C. B. 181; as to the effect of filling up the blanks in a deed after execution by one of the parties, see *Adams v. Bruce*, 33 Beav. 55.

(k) *Black v. Gwynne*, 7 Exch. 862.

(l) See *Barrow v. Dryborough*, 6 T. R. 212.

matter do not appear to be of the value of £5 (*m*), no duty is payable; and if, on a sale by auction, the same person buy several lots, a distinct contract arises for each lot; and whatever may be the aggregate amount, no stamp is required for any lot which separately sells for less than £5 (*n*). Supposing the purchase-money to exceed £5, a 6d. stamp only is payable (*o*); this may, without payment of a penalty, be affixed within fourteen days after execution; after that time a £10 penalty becomes payable (*p*). The duty may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed (*q*).

Chap. VI.
Sect. 5.

A contract by the assignees of a bankrupt for the sale of his real estate, is exempt from stamp duty (*r*); as, also, are agreements under the Acts for promoting the residences of the Parochial Clergy, the Church Building, Poor Law, Tithe Commutation, and Commons Inclosure Acts, and agreements entered into by the Commissioners of Woods and Forests (*s*). Whether a receipt for purchase-money, unless duly stamped as such, is admissible as evidence of the contract, has been the subject of conflicting decisions (*t*).

Cases of
exemption.

There must, in general, be distinct stamps for each distinct agreement or contract: upon this principle, where a person purchases several lots at an auction, the agreement must bear a stamp in respect of each lot for which the purchase-money exceeds £5 (*u*). Upon a purchase from persons

Several
stamps when
requisite.

(*m*) See *Liddiard v. Gale*, 4 Exch. 816, and 33 & 34 Vict., c. 97, Sched.

(*n*) See *Emmerson v. Heelis*, 2 Taunt. 38; *Roots v. Lord Dormer*, 4 B. & Ad. 77; see, as to goods, *Diggs v. Wisking*, 2 C. L. R. 705.

(*o*) 33 & 34 Vict. c. 97; compare 23 Vict., c. 15, under which there was a further progressive duty for every entire quantity of 1,000 words above the first 2,100.

(*p*) See 33 & 34 Vict. c. 97, s. 15.

(*q*) 33 & 34 Vict., c. 97, s. 36.

(*r*) *Flather v. Stables*, 5 Jur. 102; see 6 Geo. IV. c. 16, s. 98; 12 & 13

Vict. c. 106, s. 138; and now 32 & 33 Vict. c. 71, s. 113.

(*s*) See Tilsley on Stamps, 759 to 762, 1st edit.

(*t*) *Evans v. Prothero*, 2 Mac. & G. 319; *S. C.*, *contra*, 1 De G. M. & G. 572; see 24 Beav. 41; and see and consider *Diplock v. Hammond*, 5 De G. M. & G. 320.

(*u*) See *James v. Shore*, 1 Stark. N.P. C. 426; *Watling v. Horwood*, 12 Jur. 48. But a lease is not subject to an agreement stamp, in respect of it, reserving an option of purchase to the lessee; *Warrington v. Warrington*, 5 C.B. 635.

having separate interests in an estate (e.g., tenants in common, or tenant for life and remainderman), the agreement, if so worded as to be a contract for the entire estate, would seem to be subject only to single duty; but if, on the contrary, it were so worded as to amount to separate contracts with the several vendors for their separate interests in the property, so as to give to each vendor a right to enforce the agreement in respect of his own particular interest, it is conceived that separate stamps would be requisite.

Loss of unstamped agreement, effect of.

If the agreement be not stamped, and be subsequently lost, or even destroyed by the fraudulent act of the party chargeable thereon, a Court of Equity can give no relief unless the plaintiff can procure a copy; the defendant, if he have a copy, will be ordered to produce it for the purpose of its being stamped (x), and it appears, that a copy may be made from recollection, if the witnesses can swear to the precise terms, and not merely the general tenor of the instrument (y); and the Courts will, in the absence of circumstances inducing a supposition to the contrary, presume that a lost instrument was duly stamped (z); or that obliterated stamps were of the right amount (a); and they have now power (b), to admit unstamped or insufficiently stamped instruments in evidence upon payment in Court of the deficient stamp duty, a penalty of £10, and a further sum of £1. And if the agreement is admitted by the answer, the want of a stamp is immaterial (c).

Instrument recording transfer of property is liable to duty as a conveyance.

It has been held by the Court of Exchequer, that any instrument operating as a record of the transfer of property, (not being goods, wares, or merchandise), e.g., a memorandum that A. has sold all the goods and fixtures in a certain shop,

(x) See *Fowle v. Freeman*, Sug. 144; *Bousfield v. Godfrey*, 5 Bing. 418; *Blair v. Ormond*, 1 De G. & S. 428.

(y) *Smith v. Henley*, 1 Ph. 391.

(z) See cases referred to in last two notes, and *Hart v. Hart*, 1 Ha. 1; *Croft v. Solomon*, 6 C. B. 758;

Cloernadoue v. Orval, 18 C. B. 36; 2 Jur. N. S. 474.

(a) *Doe v. Coombs*, 4 Jur. 930, Q. B.

(b) 33 & 34 Vict. c. 97, s. 16.

(c) *Huddleston v. Briscoe*, 11 Ves. 583.

is a conveyance within the meaning of the Stamp Laws, and must bear the *ad valorem* duty (*d*).

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Sect. 5.

We may here remark, that an agreement in evasion of the Stamp Laws, *e. g.*, that the document shall, for the present, remain unstamped, but that, if it shall become necessary to stamp it, one of the parties thereto will pay the penalty, cannot be enforced (*e*).

Agreement
in evasion of
the stamp
laws void.

(6). *As to illegal agreements.*

Section 6.

As a general rule, no agreement can be enforced, at Law or in Equity, which is entered into for an illegal purpose (*f*); or has a tendency to promote an unlawful act (*g*); or is contrary to the policy of the law: as *e. g.*, where an antenuptial settlement contemplates a future separation of husband and wife (*h*): so, where a corporation, before obtaining a statutory authority, agreed for the subsale of part of the lands, which they intended to take under their compulsory powers (*i*): and if the illegal agreement is to be performed in this country, it is immaterial that it was entered into in a country where it would have been considered valid (*k*). And there are certain agreements which the Legislature has pronounced to be, in their own nature, illegal. The Statute of 32 Henry VIII. (*l*), declares it to be unlawful to buy or sell any pretended right or title to any lands or hereditaments, unless the vendors or their ancestors or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or remainder thereof, or taken the rents or profits thereof, within a year before the sale but the purchase of a pretended title,

Agreement
for any
illegal pur-
pose void.

Sale of pre-
tended title.

(*d*) *Horfall v. Hay*, 2 Exch. 778.
But see as to real estate, *Wilmot v. Wilkinson*, 6 B. & C. 506; *Toll v. Lee*, 4 Exch. 230.

(*e*) *Abbott v. Stratton*, 3 J. & L. 616.

(*f*) *Vide infra*, Ch. XVII. and XVIII. As to usury, *vide supra*, on the sale of a rent, *Luke v. O'Donnell*, 2 Sch. & L. 466, 472, *affd.* 742; sale for purpose of a lottery, *Fisher v.*

Bridges, 3 El. & B. 642.

(*g*) *Egerton v. Lord Brounlow*, 4 H. L. C. 1; and see *Hilton v. Eckersley*, 1 Jur. N. S. 874.

(*h*) *H. v. W.*, 3 K. & Jo. 382.

(*i*) *Galloway v. Mayor, &c., of London*, 10 Jur. N. S. 552; 11 Jur. N. S. 263.

(*k*) *Grell v. Levy*, 10 Jur. N. S. 210.

(*l*) C. 9; see sect. 2.

To what the
Statute ex-
tends.

To what it
does not
extend.

by a person in lawful possession of the rents and profits, is allowable (m). In a modern case, where A. possessed of a term of years, died in 1828, and strangers entered and occupied until 1841, when A.'s next of kin took out letters of administration and sold and assigned the term, the assignment was held to be clearly void (n); so, the Act extends to a lease under a pretended title (o); and to the assignment of the mere right to file a bill to set aside a previous voidable conveyance (p); and to the purchase of an estate for the purpose of acquiring the right to impeach some previous arrangement affecting the property (q); and to an agreement that the attorney shall, in lieu of costs, have a share of the estate recovered for his client (r); and *a fortiori*, to an agreement that, in addition to his legal costs, he shall have a definite portion of the estate; or a sum proportionate to the value recovered (s); and it would seem that any absolute purchase by the attorney of the subject-matter of the suit *pendente lite* is unlawful, and void (t); but he may take security for his costs on the subject-matter of the suit (u). The Act, however, does not extend to an assignment of a purchaser's interest under the agreement for sale (x), nor to an agreement to sell an estate in the event of the party becoming seised of it under the will of the living owner (y); nor to an assignment of the subject-matter of a suit (z); even though the assignees be mere volunteers (v); nor to a security on the subject-matter of a

(m) See sect. 4.

(n) *Doe d. Williams v. Evans*, 1 C. B. 717, *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & W. 135, and see *Wood v. Downes*, 18 Ves. 125, *Burke v. Grienc*, 2 Ba. & B. 517; *Moore v. Orred*, 1 Dru. & Wal. 521.

(o) *Hutchins v. Lander*, G. Coop. 54.

(p) *Prosser v. Edmunds*, 1 Y. & C. 481.

(q) *De Hoghton v. Money*, L. R. 2 Ch. Ap. 164.

(r) *Thomas v. Lloyd*, 3 Jur. N. S. 232; see 33 & 34 Vict. c. 23.

(s) *Earle v. Hopwood*, 7 Jur. N. S.

(t) *Simpson v. Lamb*, 7 Q. B. 84; 3 Jur. N. S. 412.

(u) *Simpson v. Lamb*, *ubi supra*; and see *Wood v. Downes*, 18 Ves. 120.

(x) *Wood v. Griffiths*, 1 Sw. 56; Sug. 356; and see 8 & 9 Vict. c. 106, s. 6.

(y) *Cook v. Field*, 15 Q. B. 466.

(z) *Harrington v. Long*, 2 Myl. & K. 590; see *Martyn v. Macnabara*, 2 Con. & L. 541; *Shilly v. Delony*, 2 Ir. Eq. 379; *Cutbill v. Taylor*, 15 Beav. 117.

(a) *Dickinson v. Harrell*, L. R. 1 Eq. 337.

suit (b). It has, however, been held that where the assignment contains an indemnity from the purchaser to the vendor against the costs incurred, or to be incurred, in the suit, the transaction savours of champerty (c); but this distinction has not been lately followed; thus, where annuities were sold pending a suit which related to them, and the vendors took an indemnity against past and future costs, it was held that the sale was not affected by the laws relating to champerty (d). Nor does the Act apply if the purchaser have a previous common interest in the event of the suit; as in the case of a purchase, by a second mortgagee, of the interest of the first mortgagee, during a suit in which the mortgaged property is claimed under a paramount title (e); nor where parties, having a common interest, enter into an arrangement respecting the litigation for securing it (f); nor where the agreement contains no stipulation for the commencement of a suit, and no suit is pending (g); nor to an agreement to enable the purchaser of an estate to recover for rent due, or injury done to the property prior to the purchase (h); nor to a conveyance to a reversioner or remainderman, with a view to strengthen his estate (i); nor to cases where the right purchased is originally clear, but the litigation results from circumstances subsequently arising or subsequently known (k); and the nature of reversions necessarily excludes them from the direct operation of the Act of Henry VIII.: but an agreement in respect to a reversion may be so framed as to be impeachable as savouring of champerty (l). A plaintiff, who has an original title not founded on champerty, is not disqualified to sus-

(b) *Anderson v. Radcliffe*, 1 El. Bl. & Ell. 806, 819; 5 Jur. N. S. 704; 6 Jur. N. S. 578.

(c) *Harrington v. Long*, 2 Myl. & Ke. 590; but see Sir Jas. Wigram's comments on this case, 4 Hare, 430.

(d) *Knight v. Bowyer*, 25 Beav. 609; affd. 2 De G. & Jo. 421.

(e) *Hunter v. Daniel*, 4 Ha. 420.

(f) *Bainbridge v. Moss*, 3 Jur. N. S. 58.

(g) *Slyce v. Porter*, 3 Jur. N. S. 330; 5 W. R. 31.

(h) Sug. 357; *Williams v. Protheroe*, 5 Bing. 309; S. C. 3 Y. & J. 129.

(i) Co. Litt. 369 b; see *Anson v. Lee*, 4 Sim. 364.

(k) *Wilson v. Short*, 6 Ha. 360.

(l) See *Reynell v. Sprye*, 1 De G. M. & G. 690, and cases there cited.

Chap. VI.
Sect. 4.

tain the suit by reason of his having made an improper bargain with his solicitor as to the mode of his remuneration (m).

Splitting
votes for elec-
tioning
purpose.

By the Act of the 7 & 8 Will. III., c. 25, s. 7, it is declared that all conveyances made of any hereditaments, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of Members to serve in Parliament, are void and of none effect; and, by a later Act (n), such conveyances, although containing conditions or stipulations of defeasance, are declared to be free and absolute. It appears, however, from recent decisions, that a conveyance made to carry into effect a real *bond fide* contract for sale, where the purchase-money is paid and possession taken without any secret reservation or trust for the benefit of the seller, is not within the Statutes, although it be made with a view to the multiplying of voices, or to the splitting of the freehold; the intention of the Statutes being, to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive (o); and that the Statutes only affect the Parliamentary Law, and do not prevent the estate from passing (p).

Selling an
advowson.

The right to sell an advowson, with the next presentation as part thereof, or a next presentation alone, subsists so long as there is an incumbent; nor will his known imminent danger, and his death within a few hours after completion of the purchase, avoid the transaction as simoniacal, if the parties had no particular clerk in view (q); so, a stipulation by a vendor, who is not the incumbent, that he will pay interest on the purchase-money to the purchaser until the

(m) *Hilton v. Worcester*, 1 R. 4 Eq. 432. As to what constitutes common barratry and maintenance, see *Scott v. Miller*, Johns. 227; and as to the remuneration of solicitors, see now 33 & 34 Vict. c. 22.

(n) See 10 Anne, c. 22.

(o) *Riley, app., Crossley, resp.* 2 C. B. 146; *Alexander, app., Newman, resp.*, *ibid.* 123; *Thornely, app., Aspland, resp.*, *ibid.* 160.

(p) *Phillipotts v. Phillipotts*, 10 C. B. 85.

(q) *Fox v. Bishop of Chester*, 3 Bl. N. S. 123.

living becomes vacant, does not make the contract simoniacal, if there is no undertaking to procure an avoidance (*r*); so, a stipulation, on an exchange of benefices, that dilapidations shall not be made good, is not simony (*s*). When the church is void the right of immediate presentation cannot be sold either alone or as part of the advowson; and the purchase of a next presentation by a clerk, with a view to present himself is prohibited by Statute as simoniacal (*t*). This enactment is not found in practice to prevent purchases of entire advowsons by clergymen, with the view to present themselves upon the next vacancies; but the terms of the Act, and of the oath against simony, generally suggest greater difficulties to the mind of the conveyancer than to that of the clerical casuist.

Under a modern Act (*u*), a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements, or hereditaments of any tenure, whether the object of the gift, or limitation of such interest or possibility, be or be not ascertained; also, a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed, and may, of course, be contracted for. It seems that the words "right of entry," do not comprise a right of entry for condition broken; but only a right of entry in the nature of an estate or interest; i. e., where a person by lapse of time has lost everything except the right to enter; at any rate, the former kind of right will not pass under an assurance unless expressly named (*x*).

Contingent
interests, &c.

The 7 & 8-Vict. c. 110, s. 23, rendered absolutely illegal and void (*y*) contracts for purchase entered into by the pro-

Contracts by
joint-stock
companies

(*r*) *Sweet v. Meredith*, 8 Jur. N. S. 637.

(*s*) *Goldham v. Edwards*, 2 Jur. N. S. 493.

(*t*) See 12 Anne, c. 12.

(*u*) 8 & 9 Vict. c. 106, s. 6, which takes effect from the 1st Oct. 1845.

(*x*) *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 685, as to

rights of re-entry; see *Crane v. Batten*, 22 L. J. 220.

(*y*) *Bull v. Chapman*, 8 Exch. 444. See now as to how far a company may be bound by the acts of its promoters, *Lindley*, 400, *et seq.*, and *supra*; and see Companies Act, 1867, 30 & 37th Vict., c. 131, sec. 35.

**Chap. VI.
Sect. 6.**

before com-
plete registra-
tion.

Contracts by
mortgagee
with mort-
gagor.

motors of joint-stock companies prior to complete registra-
tion, unless made conditional only, and to take effect on
complete registration.

A mortgagee cannot, in Equity, contract with the mortgagor, at the time of the loan, for the absolute purchase of the land at a specific sum, in case of default being made in payment of the mortgage money at the appointed time (z); but this rule does not interfere with a purchase of the equity of redemption by the mortgagee as a distinct and subsequent transaction; nor does it preclude an agreement by the mortgagor, at the time of the loan, to give the mortgagee a right of preemption in case of a sale during the continuance of the security (u).

(z) Coote Mortg. 14.

u) *Ibid.*

AS TO THE EFFECT OF THE CONTRACT ON THE RIGHTS OF Chap. VII.
THE PARTIES.

1. *Purchaser entitled to estate, and vendor to purchase-money.*

2. *Purchaser's general rights under contract as against vendor.*

3. *Vendor's general rights under contract as against purchaser.*

4. *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c., of either party.*

5. *Death of vendor before completion,—its effect on relative rights of his real and personal representatives, under old, and under new law.*

6. *Death of purchaser before completion,—its effect on relative rights of his real and personal representatives, under old, and under new law.*

7. *Effect of contract in various special cases.*

(1.) FROM the time of the owner of an estate having entered into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money: but the relationship which is thus created is only quasi-fiduciary, and does not entail all the obligations of an ordinary trusteeship (b). For instance, when A contracted to sell leaseholds to B, who paid part of the purchase-money, and then deposited with his bankers the contract,

Sect. 1.

Vendor, how far a trustee for purchaser.

(b) *Wall v. Bright*, 1 Jac. & W. 501; *Ross v. Watson*, 10 H. L. C. 672.

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Sec. 1.

accompanied by a memorandum in which he agreed to assign to them the leasehold premises by way of mortgage; and A having received through their solicitor a written notice of such agreement, subsequently assigned the premises to B without any notice being taken in the assignment of the claims of the bankers; it was held by Lord Hatherley, reversing the decision of Lord Romilly, that A was not liable at their suit to make good the loss which they in consequence sustained (c), and this reversal was affirmed in the House of Lords. On the other hand if the agreement be binding on the purchaser, he is, as a general rule, under a personal, equitable, as well as legal liability to the vendor for payment of the purchase-money (d).

Although vendor be a trustee, or donee of power.

And the agreement equally binds the estate, although the vendor be a trustee, or a mere donee of a power of sale, instead of absolute owner (e).

Section 2.

As to purchaser's general rights under contract as against vendor.

General nature of purchaser's equitable ownership.

(2). *As to purchaser's general rights under contract as against vendor.*

It is sometimes stated, in general terms, that by the contract, the purchaser becomes, in Equity, the owner of the property: but "this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property" (f); nor, *semble*, can he as against

(c) *McCreight v. Foster*, L. R. 5 Ch. Ap. 604; and sub nom. *Shaw v. Foster*, L. R. 5 E. & Ir. Ap. 321, and see *Orbitre v. Poole*, L. R. 12 Eq. 13; and as to the liability of a vendor in possession for deterioration, see *Phillips v. Blower*, L. R. 8 Ch. Ap. 173; and *vide infra*, Ch. XIII.; sect. 4.

(d) See *Green v. Smith*, 1 Aik. 572; *Pollard v. Moore*, 3 Aik. 278;

Toft v. Stephenson, 7 Ha. 1; *Pooley v. Budd*, 14 Beav. 44; *Birch v. Joy*, 3 H. L. C. 565. But the purchaser is not a trustee within the meaning of the Trustees' Relief Act: *vide infra*.

(e) See *re Dyke's Estate*, L. R., 7 Eq., 837.

(f) *Per Lord Cottenham*, in *Tucker v. Small*, 3 M. & C. 70; and see *Wall v. Bright*, 1 Jac. & W. 301.

the vendor enforce such equities, without at the same time praying or offering specific performance of the contract itself (g). So notice of an incumbrance given to the purchaser before the execution of the conveyance, is effectual, although the purchase-money be actually paid (h); and even after the execution of the conveyance, if the purchase-money be not actually paid (i), the purchaser, although he may then have, or subsequently acquire, the legal estate, can, it is conceived, use it against the incumbrancer only to the extent of securing such purchase-money. His interest under the contract may, however, be charged, or assigned (k); and used to be bound by a judgment (l): but the incumbrancer, assignee, or creditor, can only obtain relief, as against the vendor, on the terms of undertaking all the purchaser's liabilities under the contract (m); and apparently the vendor is not bound by notice of an incumbrance which does not purport to give the incumbrancer an immediate right to offer himself as the substitute for the purchaser (n).

Is capable of
alienation.

Up to the time fixed for completion, the vendor is, in the absence of special stipulation, entitled to the crops, or other ordinary profits of the land: he would not, however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time fixed for completion, and pending negotiation, he may, it appears, in due course of husbandry, cut coppice and get in crops, but the net profits will belong to the purchaser (o). Where the contract was for the purchase of an estate, in-

Vendor's
right to crops,
&c., pending
completion.

(g) *Fox v. Russell*, 3 Sma. & G. 242.

(h) *Wigg v. Wigg*, 1 Atk. 384.

(i) *Tildenley v. Lodge*, 3 Sma. & G. 543.

(k) *Painé v. Meller*, 6 Ves. 349, 352; *Seton v. Slade*, 7 Ves. 274; *Dowson v. Solomon*, 1 Drew. & Sma. 1.

(l) *Baldwin v. Belcher*, 1 J. & L. 18; *Walcott v. Lynch*, 13 Ir. Eq. R. 199; *Governors of Gray Coat Hospital v. Westminster Improvement Commis-*

sioners, 1 De G. & Jo. 531.

(m) *Dyer v. Pulteney*, Barn. Ch. R. 160.

(n) See and consider *McCreight v. Foster*, *ubi supra*.

(o) *Poole v. Shergold*, 1 Cox, 273; Hug. 644; see as to manorial fines, on purchase of a manor, *Garrick v. Lord Camden*, 2 Cox, 231 (stated *infra*, Ch. XXI.); and *Earl of Hardwicke v. Lord Sandys*, 12 M. & W. 761; *Cudden v. Tite*, 1 Giff. 395.

Case. including the growing crops, to be completed and possession given on the 24th June; and the time was extended by consent till the 29th September, and the vendor in the interval sold the crops, the purchaser was held entitled, in Equity, only to the crops growing at the time of the actual completion, and was left to his remedy (if any) at Law for the recovery of the produce of the crops (*p*).

Windfalls, &c., belong to purchaser.

Everything, however, which forms part of the inheritance belongs to the purchaser from the date of the contract; so that he is entitled to windfalls (*q*), and to the produce of ordinary timber cut (*r*), or, it is conceived, stone or gravel quarried or dug by the vendor after the contract (*s*).

Material alteration of property by vendor avoids the contract.

And any act of the vendor, which prevents his giving to the purchaser that which was, substantially, the subject-matter of the contract, renders the agreement voidable by the latter; *e.g.*, the felling of ornamental timber (*t*): and, even as to ordinary timber, the authorities merely show that the fall of it *may* be matter for compensation; cases might, it is conceived, occur, in which the Court would relieve a purchaser on account of falls of wood, although neither planted nor left for ornament or shelter, *e.g.*, as where sufficient is not left for repairs, or where the general character or appearance of the estate, or of any special part of it, is materially altered.

Purchaser takes accidental benefits, and loses accidental losses, as in

And since, as between the parties to the contract, the purchaser is owner of the estate, he has the benefit of any improvements to the property which may happen after the date of the contract (*u*); *e.g.*, the dropping of lives on the

(*p*) *Weister v. Donaldson*, 11 Jur. N. S. 404. *Quere*, the legal remedy.

(*q*) *Poole v. Shergold*, *ubi supra*.

(*r*) *Magenis v. Fallon*, 2 Moll. 281.

(*s*) See *Nelson v. Bridges*, 2 Beav.

(*t*) *White v. Nutt*, 4 B. & W. 61;

Sparrier v. Hancock, 4 Ves. 667, *ubi supra*.

(*u*) Expenditure upon the property by the vendor seems to fall within the rule: see *Morris v. Taylor*, 3 Ha. 60; *Clay Hall v. Harding*, 5 Ha. 226.

purchase of a reversionary interest (x); or a sudden rise in the value of land from its being required for a public purpose (y); and must bear any loss which occurs without the fault of the vendor; *e. g.*, the deterioration of the property through the calamities of the times (z); the death of the *cestui que vie*, on the purchase of an estate for life, or a life annuity (a); or the admission of younger lives to copyhold tenements on the purchase of a manor, and the consequent diminution in the value of the fines (b); or the destruction of house property by fire (c), or an earthquake (d); and, as respects fire, the vendor, unless he agree that the property shall be kept insured (e), or, it would seem, make some proposition to the purchaser grounded upon the fact of its being insured, need not keep up the insurance, or give the purchaser notice of its having dropped (f); but if the omission by the vendor to keep up the insurance renders the title impeachable, the purchaser, it seems, may be discharged (g); so, if the vendor, though not bound to insure, effect an improper insurance, and the property thereby becomes liable to forfeiture, he cannot enforce the contract (h). The purchaser of house property must, as between himself and the vendor, make good any injury done to adjoining premises by the fall of the buildings subsequently to the contract (i).

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cases of death
of tenant for
life:

or of *cestui que
vie*:

or fire.
Vendor,
whether
bound to in-
sure.

And where the accruing benefit is such, that, if taken by

Restrictions
on purchaser's

(x) 1 Madd. 539.

(y) 6 Ves. 352.

(z) *Pool v. Sherryold*, 2 Bro. C. C. 118.

(a) Sug. 292; and see 6 Ves. 352.

(b) *Ouddon v. Tite*, 1 Gil. 395; 4 Jur. N. S. 579.

(c) *Paine v. Muller*, 6 Ves. 349; *Harford v. Purrier*, 1 Madd. 532, 539; *Rarell v. Hussey*, 2 Ba. & B. 237; and see *Pool v. Adams*, 12 W. R. 683; V.-C. K.; but see *Bacon v. Simpson*, 3 H. & W. 78. *Aliter*, if the vendor have agreed to repair or alter the premises, and have not done so before

the fire; *Conter v. Macpherson*, 5 Moo P. C. 83, 106.

(d) *Cass v. Rudde*, 2 Vern. 280; but see 1 Bro. C. C. 157, n., where the case is said to be misreported.

(e) *Pool v. Adams*, 12 W. R. 683.

(f) 6 Ves. 353.

(g) *Palmer v. Goren*, 25 L. J. N. S. (Ch.), 841.

(h) *Dowson v. Solomon*, 1 Drow. & Sma. 1; 8 W. R. 123; 6 Jur. N. S. 33.

(i) *Robertson v. Skelton*, 12 Beav. 260, 266.

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Book 2.

right, — case
of vacancy on
sale of advow-
son.

the purchaser, it would or might be irrecoverably lost to the vendor, (as in the case of a vacancy occurring, pending discussions on the title to an advowson,) the purchaser claiming the benefit must, as a general rule, accept the title (*k*): in *Wyvill v. Bishop of Exeter* (*l*), the right to present was altogether denied him, on the ground of his objections to the title having been frivolous; but the case seems of doubtful authority (*m*).

Sale in con-
sideration of
life annuity;
and death of
cestui que vie
before convey-
ance.

So, in the converse case of an estate being sold in consideration of a life annuity, and of the *cestui que vie* dying before completion, the purchaser will be entitled to a conveyance on payment of the arrears (*n*). It is, however, as a general rule, essential, in such a case, that he should, in the lifetime of the *cestui que vie*, have made, or tendered, any payment which became due during such lifetime (*o*): but the rule, it is presumed, would not apply, unless a sufficient interval had elapsed between the payment becoming due and the death, to allow of payment or tender being made according to the usual course of business; the omission, in fact, must amount to *laches* (*p*): nor, on the other hand, where a payment had been previously refused or long neglected, is it likely that a Court of Equity would be satisfied with payment or tender made at a time when the *cestui que vie* was, to the knowledge of the purchaser, dying or dangerously ill. And although the Court, upon sales in consideration of an annuity, will enforce specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy into the fairness of the transaction; and will, under such circumstances (*q*), require a clear case for specific performance.

Not ent. left
until com-
pletion to par-
liamentary
franchise.

A purchaser is not entitled, before completion, to vote at the election of a member of parliament in respect of the land purchased (*r*).

(*k*) Sug. 293.

(*l*) 1 Pri. 292.

(*m*) Sug. 293.

(*n*) *Mortimer v. Copper*, 1 Bro. C. C. 156; *Baldwin v. Boulter*, *ibid.*, cited in *Giles v. Trecothick*, 9 Ves. 234, 240.

(*o*) *Jackson v. Lever*, 3 Bro. C. C. 605; *Pope v. Root*, 1 Bro. P. C. 370.

(*p*) See Sug. 295.

(*q*) *Davis v. Cooper*, 5 M. & C. see p. 219.

(*r*) *Anday v. Lewis*, 2 Sug. N. S. 164.

We shall hereafter have occasion to consider the above rules, with reference to sales under a decree of the Court of Chancery (*s*).

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Sales by
Court.

Where a public company, under the usual compulsory power, contract for the purchase of part only of the land subject to the power, this will not prevent their subsequently exercising it in respect of the residue (*t*).

Contract by
public com-
pany under
compulsory
power, does
not exhaust
power.

(3.) *As to vendor's general rights under contract as against purchaser.*

Section 3.

The vendor has a lien upon the estate for the unpaid purchase-money (*u*): if, therefore, before payment, the purchaser be in possession, Equity will restrain him from any act,—such as felling timber,—by which the vendor's security might be lessened (*x*). If, however, only an inconsiderable part of the purchase-money remain unpaid, it may be conjectured that the vendor, applying for the injunction, would, as would an ordinary mortgagee, have to satisfy the Court that the estate without the timber was an insufficient security (*y*): and it is also presumed that the injunction might be so extended as to restrain the cutting of underwood out of the due course of husbandry (*z*), or any other similarly prejudicial act.

As to vendor's
general rights
under con-
tract as
against pur-
chaser.

Vendor's Lien
on estate.

He may re-
strain a fall of
timber by
purchaser in
possession.

Prior to the 27 & 28 Vict. c. 112, a judgment entered up against the vendor subsequently to the contract, and registered, was a lien upon the unpaid purchase-money (*a*): and, consequently, to that extent, upon the land itself. And an extent upon Crown process, at any time before convey-

Judgment is
a lien on un-
paid purchase-
money.

(*s*) *Infra*, Ch. XXI.

(*t*) *Simpson v. Lancaster and Car-
lia's R. Co.*, 15 Sim. 580; *Stamps v.
Birmingham and Stour Valley R. Co.*,
2 Ph. 673; 6 Rail. Co. 123.

(*u*) As to which, *vide infra*, Ch.
XIV., sect. 1.

(*v*) *Crookford v. Alexander*, 15 Ves.
138.

(*y*) See *Humphreys v. Harrison*

1 Jac. & W. 581; *Hippesley v.
Spencer*, 5 Madd. 422; *King v. Smith*,
2 Ha. 239.

(*z*) *Humphreys v. Harrison*, *ubi
supra*.

(*a*) *Prid.* on Judg. 21; *infra*, Ch.
XI.

Case VII. ~~See 2~~ **ance,** binds the purchaser although he has paid his money (b).

Vendor's rights, on death of purchaser without heir before completion.

If the purchaser die, intestate and without an heir, before conveyance, it seems probable that the vendor might keep the estate and any part or all of the purchase-money, if paid (c): as there is no escheat of equitable estates (d).

Tenancy of purchaser, whether determined by contract.

Where the purchase is by a tenant, either from year to year or for a longer term, the contract will not determine the tenancy, unless specially worded so as to be an absolute contract for purchase whether the vendor do or do not show a good title (e): but Equity will restrain the landlord from enforcing payment of rent pending completion (f).

Tenancy at will determined.

A mere tenancy at will appears to be determined by the contract (g); from the time at which possession is agreed to be given to the purchaser

Purchaser in possession not liable for use and occupation, if no title.

It has been determined, that a purchaser who has been let into possession, pending discussions as to title, cannot, if the contract go off through defects in title, be sued for use and occupation: even although the occupation may have been a beneficial one (h). nor can he, unless he agreed to quit on some specified event which has happened (i), be ejected without a demand of possession (k): the above questions should, of course, be provided for by special agreement where

(h) *Rez v. Snor*, 1 Price, 220, n.; see 2 Vict. c. 11, ss. 8, 9, 10, and 11.

(c) See Sug. 295, 296, commenting on *Thurges v. Whate*, 1 W. Bl. 123; see 4 & 5 Will. IV. c. 23.

(d) S. C.; *Beale v. Symonds*, 16 Beav. 406.

(e) *Doe v. Stanion*, 1 M. & W. 685; *Tarte v. Darby*, 15 M. & W. 681.

(f) *Daniels v. Darby*, 16 Ves. 253.

(g) See 178.

(h) *Winterbottom v. Williams*, 2 Q.

B. 611; and see *Kirtland v. Founsett*, 2 Taunt. 145, where the Court seemed to attach importance to the fact of the purchaser having paid part of the purchase-money; see p. 147; but this, although it was also the case in *Winterbottom v. Hughes*, does not seem to have been there considered material. See, in Equity, *Stevens v. Guppy*, 3 Bea. 171; *Williams v. Shaw*, ib., 178, n.

(i) *Doe v. Sayer*, 3 Camp. 8.

(k) See 1 M. & W. 709; *Right v. Board*, 15 East, 216.

the purchaser is let into possession before payment, or where the purchase is by a tenant. A purchaser who has let a tenant into possession, can maintain an action for use and occupation against him, although the purchase be not completed; the tenant being estopped from disputing the title of the party from whom he received actual possession (*l*).

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It seems probable that if, after the contract, the vendor lay out money on the property, *eg*, in obtaining a renewal of the lease on which it is held, he has no claim on the purchaser for the expenditure (*m*): but this rule, it is conceived, could not apply to expenditure essential to the preservation of the property, and incurred by the vendor after the expiration of the time fixed for completion,—the delay resting with the purchaser.

Expenditure
by vendor.

(4.) *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c, of either party*

Section 4.

Rights of
vendor and
purchaser,
inter se, not
affected by
death, bank-
ruptcy, &c., of
either party.

The contract, when once entered into, will not without an express stipulation to that effect, be avoided by the death, bankruptcy, insolvency, or lunacy (*n*), of both or either of the parties, even before the time fixed for completion.

Contract not
avoided by
death, bank-
ruptcy, or
insolvency.
Election by
assignees of
bankrupt
under the old
laws.

Previously to the late Bankruptcy Act, upon the bankruptcy of a purchaser, the vendor might require the assignees to elect whether they would abandon or perform the contract; and, if they failed to declare their election (*o*), he might apply

(*l*) See *Doe v. Mills*, 4 Nev. & M. 25, 29; and *Hall v. Vaughan*, 6 Pri. 157; 7 Q. B. 617. See the doctrine of estoppel between landlord and tenant explained, *Langford v. Selmes*, 3 K. & Jo. 226; *Morton v. Woods*, L. R. 3 Q. B. 658; L. R. 4 Q. B. 293.

(*m*) *Supra*, p. 242, n. (*w*); and *vide infra*, Ch. XIII. s. 4, and comments on *Phillips v. Sylvester*, L. R. 8 Ch. Ap. 173.

(*n*) *Winged v. Lefebury*, 2 Eq. Ca. Abr. 32; *Orlebar v. Fletcher*, 1 P. Wms. 737; *Owen v. Davies*, 1 Ves. 82; *Brooke v. Hewitt*, 3 Ves. 255; *Whitworth v. Davies*, 1 Ves. & B. 545; *Valpy v. Oakley*, 16 Q. B. 941; Sug. 170, 220; *infra*, Ch. XVIII.; as to lunacy, see 16 & 17 Vict. c. 70, s. 122.

(*o*) As to what amounted to election, see *Hastings v. Wilson*, Holt's N. P. Ca. 290; and *vide supra*, p. 83.

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by petition for delivery up of the agreement and for possession of the premises (p): and if, in any case, they allowed a reasonable time to elapse without requiring the contract to be performed, they were considered to have abandoned it (q); and the question, what was a reasonable time, would, in an action at Law, be left to the jury (r): or the vendor might petition for a resale of the property, and for payment of the amount remaining due to him, and for leave to prove for the deficiency (s) (if any); and he was held entitled to his costs, although there was no written contract, but only part performance of a parol agreement (t).

Disclaimer by
trustee of
bankrupt
under the
recent Act.

Under the Bankruptcy Act, 1869, the trustee of the bankrupt's property may, notwithstanding that he has endeavoured to sell, or has taken possession or exercised acts of ownership, by writing, under his hand, disclaim any property (u) of the bankrupt which is of a burdensome or unsaleable description, including unprofitable contracts; and, upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication (x): but this right of disclaimer is not to be exercisable in cases where application in writing has been made to the trustee by any person interested in the property, requiring the trustee to decide whether he will disclaim or not; and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims or not (y); and as respects leaseholds, the leave of the Court to disclaim must be first obtained (z). Any person

(p) 6 Geo. IV. c. 16, s. 76; 12 & 13 Vict. c. 106, ss. 145, 146; 24 & 25 Vict. c. 134, ss. 131, 150.

(q) *Lawrence v. Knowles*, 7 Sc. 381.

(r) *B. C.*

(s) *Dundas v. Rogers*, 6 Ves. 25, n.; *Hopwood v. Booth*, 1 B. & Ad. 496.

(t) *Langston v. Cooper*, 3 M. & D. 212.

(u) As to the meaning of the word "property," see interpretation clause, sect. 4.

(x) See 32 & 33 Vict. c. 71, s. 23.

(y) See sect. 24.

(z) See rule 23 of Bankruptcy Rules of 7 July, 1871; vs *Wilson*, L. R. 13 Eq. 186; and as to an extension of the time for disclaiming; see *re Jones*, L. R. 9 Ch. Ap. 586.

interested in the disclaimed property may, on application, obtain an order for the delivery of possession; and any person injured by the exercise of the right of disclaimer is to be deemed a creditor of the bankrupt to the extent of such injury, and the debt is made proveable under the bankruptcy.

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As a bankrupt's estate under the old law vested in his assignees by the bankruptcy, he might, before fiat, plead his bankruptcy, subsequent to the contract, to a bill for specific performance (a). Under the recent Act, until the appointment by the creditors of a trustee, the registrar is to be trustee for the purposes of the Act; and immediately upon the order of adjudication being made, the property of the bankrupt is to vest in the registrar; but is to pass to, and vest in, the trustee upon his appointment (b); and is to pass from trustee to trustee (including under that term the registrar during a vacancy of the trusteeship,) and to vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever (c). There appears to be nothing in the Act which will invalidate a plea of subsequent bankruptcy to a bill for specific performance.

Plea of bankruptcy, subsequent to the contract, to a bill for specific performance.

(5.) *Death of vendor before completion: its effect on relative rights of his real and personal representatives, under old and under new law.*

Section 5.

Upon the vendor's death, the unpaid purchase-money, although, by the agreement, made payable as he shall appoint (d), forms part of his personal estate (e): the profits of

Death of vendor before completion: its effect on relative rights of his real and personal representatives, under old, and under new law.

(a) *Lane v. Smith*, 14 Beav. 49; and see *Turner v. Robinson*, 1 Sim. & St. 4.

(b) See 32 & 33 Vict. c. 71, s. 17.

(c) See sect. 83.

(d) *Thompson v. Towne*, 2 Vern. 319; and see 1 Vict. c. 26, s. 27.

(e) *Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 Wh. & T. L. C. 659; *Baden*

v. Countess of Pembroke, 2 Vern. 213, 215; *Eaton v. Sanxter*, 6 Sim. 517; see as to standing timber, *A non.*, cited 7 Ves. 437; Sug. 188; see *Lord Hatherton v. Bradburne*, 7 Jur. 1100; 13 Sim. 599: where the question was whether the consideration payable for a mining licence was purchase-money or rent.

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Purchase-money and interest
profits.
Legal estate.

the land from his death up to the time fixed for completion belong to his real representatives (*f*): as until that time there is no conversion.

If he die before conveyance, the legal estate, of course, descends on his heir or devisee; if he die without an heir, and intestate, a conveyance of the legal estate may be obtained under the provisions of the Trustee Act, 1850 (*g*).

Heirs of equitable vendor necessary parties to conveyance.

And it has been held that where the vendor of an equitable estate dies before completion, his heirs are necessary parties to the conveyance (*h*): but in such a case the Court will not make any order purporting to vest the outstanding interest in the purchaser (*i*): a vesting order being appropriate only in respect to a legal estate.

Under old law, contract revoked prior devise in Equity.

In cases governed by the old law, as it existed before the passing of the new Wills Act (*k*), (and which, it must be remembered, is still binding in all cases where the will has not been made or re-published, &c., on or since the 1st of January, 1838), the contract for sale (assuming it to be binding as against the vendor), is, in Equity, a revocation of a prior devise of the property (*l*): the legal estate passes to the devisee, but merely as a trustee; and the purchase-money belongs to the personal estate. And even if the estate be devised in trust for sale, and then be agreed to be sold by the testator, the purchase-money will not belong to the legatees of the proceeds of sale (*m*).

Although devise was in trust to sell.

Relative rights of ven-

In such cases, the question between the real and personal

(*f*) *Lumsden v. Fraser*, 12 Sim. 263.

(*g*) 13 & 14 Vict. c. 60; or, formerly, under the 4 & 5 Will. IV. c. 23; see *Re Lord's Estate*, 2 Ph. 690; *see infra*, Ch. XIII., end of s. 1.

(*h*) *Daly v. Nelder*, 11 Jan. N. S.

(*i*) *Widdowson v. Widdowson*, 5 L. J. C. 2.

(*l*) 1 Vict. c. 26.

(*k*) *Oster v. Jager*, 2 P. W. 624; *Knolly v. Alcock*, 5 Ves. 604; *Bennett v. Lord Tenterden*, 10 Ves. 178; and see *Farrer v. Jeffery*, 3 Russ. 478, 484.

(*m*) *Arnold v. Arnold*, 1 Bro. C. C. 401; *Nichols v. Rudington*, 1 Russ. & M. 677; see *Saunders v. Cramer*, 3 Dru. & W. 87.

representatives seems to be this, viz., whether the vendor at the time of his death was, either absolutely or contingently, under such an agreement as Equity would enforce against him (n): if so, the property (as between his real and personal representatives), forms part of his personal estate from the time fixed for completion; whether such time be specified in the contract, or have to be determined by the occurrence of some collateral event, or depend upon the mere option of the purchaser (o): and is liable to probate duty in the hand of his executors (p): but unless and until such event occur, or such option be declared, the estate (in the case of intestacy) belongs to the heir (q); or in the case of a devise (either after (r) or before (s) the contract), to the devisee, unless the contract evidence a contrary intention; which intention is not evidenced by a special reservation of the rent and profits, until completion, in favour of the vendor, his heirs, executors, and administrators (t).

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Vendor's real and personal representatives, depended on his liability to perform the contract.

For example, where a lessee of real estate with an option of purchasing the fee at the end of a term of years, exercised his option after the death of the lessor, it was held that the realty was thereby converted into personalty as between the lessor's real and personal representatives (u). So, where, after the date of his will, a testator entered into a contract, giving an option to purchase which was exercised after his death, it was held that the property was converted as from the date of the exercise of the option; and that the purchase-

(n) See *Att.-Gen. v. Day*, 1 Ves. 220; *Knollys v. Atcock*, 7 Ves. 558; Sug. 186.

(o) *Laves v. Bennet*, reported 1 Cox, 167; cited 7 Ves. 436; and 4 Ves. 596. See *Emuss v. Smith*, 2 De G. & S. 722; *Good v. Teague*, 5 Jur. N. S. 116. As to what amounts to election, see *Peabury v. Clark*, 3 Mac. & G. 298.

(p) *Att.-Gen. v. Brunning*, 8 H. L. Ca. 242, reversing 4 H. & N. 94.

(q) *Townley v. Beddell*, 14 Ves. 591.

(r) Sug. 187.

(s) *Hunter v. Watson*, a case decided by Lord Selborne in May 1874, but not reported.

(t) *Shadforth v. Temple*, 10 Sim. 184.

(u) *Collingwood v. Row*, 5 W. R. 484; 3 Jur. N. S. 785; *Townley v. Beddell*, 14 Ves. 591. But see *Drant v. Vause*, 1 Y. & C. C. 590; *Emuss v. Smith*, 2 De G. & S. 722. Compare *Boven v. Barton*, L. R. 11 Eq. 454.

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money belonged to the residuary legatees, and not to the specific devisee of the estate, who was entitled only to the intermediate rents (x): and an agreement between conflicting claimants of an estate, that the same should be sold and the produce divided, has been held a conversion (y): so have the adoption and completion by the heir of his ancestor's parol contract for sale (z)

Sale in testator's lifetime without his authority.

Where chattels specifically bequeathed were sold by the friends of the testator during his life, he being then a lunatic and so continuing until his decease, this was held to be no conversion as between the specific legatee and the residuary legatee, although the unauthorized sale was approved and confirmed by the Court in an administration suit: and the fact of the specific legatee having actively concurred in the sale did not affect her right, she being then under coverture (a)

Conversion on purchases by railway companies.

And it has been held that when a railway or other public company, in exercise of its compulsory power gives due notice of its intention to take land, mere acquiescence by the owner in such notice, will (unless he be *non compos*, or under some other personal disability), (b) be considered equivalent to a contract, and have the effect of converting the property into personalty (c) But, in a modern case, where the earlier decisions were fully reviewed, the precise effect of the service of such a notice was accurately defined: for certain purposes, and to the extent of fixing the quantity of land to be taken, the service of the notice may be said to constitute the relation of vendor and purchaser; but until the negotiations

(x) *Weeding v. Weeding*, 1 J. & H. 424.

(y) *Hardey v. Hawkshaw*, 12 Beav. 562.

(z) *Frayne v. Taylor*, 10 Jur. N. S. 119.

(a) *Taylor v. Taylor*, 10 Ha. 475.

(b) *Midland Counties R. Co. v. Owen*, 1 Coll. 74, 80; but see *In re*

the East Lincolnshire R. Act, re Owen's Estate, 1 Sim. N. R. 280; and 6 J. & H. P. C. 397.

(c) *Ex parte Hawkins*, 12 Sim. 569; and see *Richards v. Att.-Gen. of Jamaica*, 6 Moo. P. C. 381; but see *Adams v. Blackwell R. Co.*, 2 Min. & G. 118, 120; 5 Rail. Co. 271; *In re Stewart*, 1 Sim. & G. 37.

thus originated result in a formal agreement, or in acts of the parties equivalent thereto (as, *e.g.*, the fixing of the price by arbitration), there is no contract, which the Court can specifically enforce at the suit of either party, and therefore no conversion (*d*). Thus where, after service of the notice, the vendor stated the price which he was willing to take, but died before his offer was accepted, it was held that, although the purchase was afterwards completed at the price asked, there was no conversion (*e*); so, where the contract with the landowner merely fixed the price per acre, without specifying the quantity to be taken, the purchase money paid for land taken after the owner's death was held to be realty (*f*); but where after service of the notice, two surveyors were appointed under the L. C. C. Act, and the landowner verbally agreed to accept the price thus ascertained, but died before completion, having by a will, long prior to the notice, specifically devised the property to A, it was held that there was a valid contract, and that the devise to A. was adeemed; but that A. was entitled to the rents which accrued between the death of the testator and the completion of the purchase (*g*).

In the absence of express clauses for the purpose, it is not the effect of a Railway Act to alter the course of the devolution of the property without the owner's consent or election; and it is now well settled that if the owner be a lunatic, or under any other incapacity, the purchase-money for the land taken retains the character of realty (*h*). Where money was paid into Court under certain local Acts, and one of the persons entitled was convicted of felony and

Where owner
is a lunatic.

(*d*) *Haynes v. Haynes*, 1 Drew. & Sma. 426, and cases cited in judgment; and *vide supra*, p. 210; and *infra*, Ch. XVII. s. 2.

(*e*) *Re Arnold*, 32 Beav. 591.

(*f*) *Ex parte Walker*, 1 Drew. 508.

(*g*) *Watts v. Watts*, L. R. 17 Eq. 217; see the V.-C.'s comments on *Ex*

parte Hawkins, and *Hughes v. Haynes*; and see also *Harding v. Metrop. R. Co.*, L. R. 7 Ch. Ap. 154.

(*h*) *Midland R. Co. v. Oswin*, 1 Coll. 74, 80; *In re Stoper*, a case decided by the Lords Justices, and cited 22 Beav. 198; but see *Steed v. Procter*, L. R. 18 Eq. 192.

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transported, it was held that his share was to be considered as realty, and that it was not forfeited to the Crown (i).

**Excessive
sale by the
Court.**

Where, on a sale by order of the Court, real estate is sold in excess of what is required to satisfy the purpose for which the sale is directed, the surplus proceeds have been held to retain the character of realty (j); but in a very recent case (k) the propriety of this doctrine was questioned by Sir George Jessel, M R., who expressed it as his opinion that "if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow, and that there is no equity in favour of the heir or anyone else to take the property in any other form than that in which it is found, and that the sole question is whether the estate has been rightfully or wrongfully sold" (l): and this has been followed by V.-C. Sir C. Hall in a later case, where a mere order for sale was held to effect a conversion (m).

**Sale of settled
estates.**

In cases of settled estate it has been held that acquiescence in a notice to treat by a railway or other public company, and negotiations as to the price, do not amount to an equitable exercise by tenants for life of an absolute power of appointment, so as to operate as a conversion of the estate into personalty as against remaindermen claiming under the limitations in default of appointment (n): nor where the estate is convertible at the request of a tenant for life is conversion the necessary result of the money having been paid into Court and invested in Consols on his application, and of his having received the dividends (o). Of course even in the case of an absolute owner, an agreement which, in anticipation of the possibility of land being taken by the company, merely fixes the price of any land which may eventually be

(i) *Re Harrop's Estate*, 3 Drew. 728. 113.

(j) *Jerry v Preston*, 13 Sim. 356,
366; *Cooke v. Dealey*, 22 Beav. 196.

(n) *Morgan v. Millman*, 3 De G. M.
& G. 24.

(l) *Steed v. Prece*, L. R. 18 Eq. 192.

(k) L. R. 18 Eq. 197

(m) *Dixon v. Auld*, L. R. 19 Eq.

(o) *Re Taylor*, 9 Ha. 596; *Re Stewart*, 1 Sm. & G. 32; *Re Horner*, 5 De G. & S. 433.

so taken, is no conversion (*p*). But conversion is the necessary result of an actual binding contract for sale, although the landowner has in fact no option but to sell (*q*). Compensation for severance, &c., is subject to the same rules as purchase-money (*r*).

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A contract under a power of sale in a settlement revokes a subsisting devise by the tenant for life, of the reversion in fee over which he has a power of testamentary appointment; and, although the contract is not completed at his death, the devisee is not entitled to the benefit of the vendor's lien for unpaid purchase-money (*s*).

Effect of
contract on
prior devise.

If, at the vendor's death there be a binding contract as against the purchaser, but no binding contract have been entered into by the vendor, the rights of his heir or devisee are, of course, unaffected; but if in such a case the heir or devisee were to concur with the personal representative in enforcing the contract, it would appear that it would enure for the benefit of the latter.

Rights of
vendor's re-
presentatives
unaffected by
contract
binding only
purchaser.

If the contract were binding upon both parties at the time of the vendor's death, no subsequent act or matter can alter the relative rights of his representatives (*t*): so that, if the purchaser subsequently act so as to lose his right under the contract, the estate belongs in Equity to the next of kin of the vendor (*u*).

Events subse-
quent to
vendor's
death imma-
terial.

If the contract (originally binding) be rescinded or abandoned by both parties in the lifetime of the vendor, there seems to be ground to contend, under the old law, that the rights of the devisee are restored (*x*): if, however, it were held that the devisee could not take, the heir would be entitled beneficially.

Effect of con-
tract being
mutually re-
scinded before
death.

(*p*) *Ex parte Walker*, 1 Dro. 508.

6 Sim. 40.

(*q*) *Re Manchester, &c., R. Co.*, 10 Beav. 365.

(*u*) *Curre v. Bowyer*, 5 Beav. 6.

(*r*) *S. C.*

(*s*) *Gale v. Gale*, 21 Beav. 349.

(*t*) *Bennett v. Lord Tankerville*, 1 Ves. 179; and see *Tebbot v. Voules*,

(*x*) Sug. 186; but the point is doubtful, see 7 Ves. 558; 19 Ves. 179. See, against the claim of the devisee, *Andrew v. Andrew*, 4 W. 520.

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Effect of its
ceasing
during his
life to bind
him :

If, during the vendor's lifetime, the purchaser alone abandon the contract, or act so as to relieve the vendor from his liability to convey the estate, it seems that the property would be considered real estate at his decease (*y*); but unless the vendor have acquiesced in the vacation of the contract, there would seem to be a difficulty in maintaining the rights of the devisee against the heir; except in cases coming within the new law: and it has been decided that, under the old law, the contract operates as a revocation where the purchaser, having paid part of the purchase-money, becomes bankrupt before completion, and the vendor buys up his interest under the bankruptcy (*z*).

or the pur-
chaser.

If, during the vendor's lifetime, he himself abandon the contract, or if, through want of title or for any other reason, the contract, at the time of his death, be capable of being enforced only *against* and not *by* him, the right of the personal representatives would seem to depend upon whether the purchaser do or do not choose to enforce specific performance (*a*); the case being, in effect, similar to those in which the purchaser has, *ab initio*, a mere option to purchase.

Effect of
general devise
upon real
estate con-
tracted to be
sold :

A general devise, of all his real estates, by the vendor, after the contract, will, *prima facie*, and in the absence of any limitations or other matter inconsistent with such an intention, pass the legal estate in the property contracted to be sold (*b*): but a general bequest by the vendor of "all his leasehold estates and securities for money," was held not to pass the leaseholds, which at the date of the will he had contracted to sell (*c*). Where the estate is devised to an infant, the necessity for a suit and a decree of the Court is

to an infant.

(*y*) Sug. 191; 1 Jarm. Wills, 46 *et seq.* & G. 386.

(*z*) *Andrew v. Andrew*, 1 Jur. N. S. 384; 3 Sma. & G. 130, affirmed on appeal (L. J. Knight Bruce dissenting), 2 Jur. N. S. 717; 3 De G. M.

(*a*) See 1 Jarm. Wills, 46 *et seq.*

(*b*) *Wall v. Bright*, 1 Jac. & W. 494.

(*c*) *Gould v. Teague*, 5 Jur. N. S. 116.

not superseded by the fact of the will containing a devise of trust estates (d); and it is conceived that the same rule will apply, where the estate descends on an incompetent heir.

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Although the estate be devised expressly by name, the devisee, as a general rule, takes merely as a trustee for the purpose of carrying out the contract, and the purchase-money forms part of the personal estate (e): but if the contract is not to be completed until a date which happens after the testator's death, the devisee is entitled to the mesne rents and profits (f). Where a testator devised, by special description, lands subject to a mere option of purchase, to A., not in fee, but for life, with remainders over in strict settlement, it was held that the purchase-money was subject to the same limitations as had been declared of the lands (g). It may be doubted, whether the specialty of the description is a sufficient ground (h) for distinguishing such a case from the earlier cases of *Laves v. Bennet* (i), and *Townley v. Bedwell* (k); but such a distinction may, it is conceived, be supported upon the ground that the estate was devised in a manner inconsistent with the intention that the devisees were to take, not beneficially, but merely for the purpose of effecting the sale.

Of specific
devise.

And the law, as above stated, appears to be unaltered by the 1 Vict. c. 26 (l); which, however, removes all doubt as to the devisee's right in cases where the contract is rescinded

Effect of
1 Vict. c. 26.

(d) *Purser v. Darby*, 4 K. & Jo. 41, 43. As to costs of such a suit, *vide infra*, Ch. XIII. a. 9.

(e) *Knollys v. Shepherd*, 1 Jac. & W. 499, cited *Thistle v. Vaughan*, 24 L. T. 5.

(f) So held by Lord Selborne as M. R., in an unreported case of *Hunter v. Watson* in May, 1874; see also *Watts v. Watts*, L. R. 17 Eq. 217. Under the old law the contract for sale would have been an ademption of the devise.

(g) *Drant v. Fause*, 1 Y & C. C. C. 580; see judgment. *Emuss v. Smith*,

2 De G. & S. 722; compare *Bowen v. Barlow*, L. R. 11 Eq. 451.

(h) See *dictum* to that effect in *Weeding v. Weeding*, 1 J. & H. 431.

(i) 14 Ves. 591.

(k) 1 Cox, 167. And see *Collingwood v. Roy*, 3 Jur. N. S. 785.

(l) *Farrer v. Lord Winterton*, 5 Beav. 1; *Moor v. Ruisebeck*, 12 Sim. 123; *Midland Counties R. Co. v. Oswin*, 1 Coll. 74, 80; *Ex parte Hawkins*, 13 Sim. 569; *Gale v. Gale* 21 Beav. 349.

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or abandoned by the vendor, or is not binding on him; and also, is in favour of the devisee's beneficial interest in cases similar to *Knollys v. Shepherd* (m).

Vendor's
interest is
within Mort-
main Act.

The vendor's interest under the contract is within the Statute of Charitable Uses (9 Geo. II. c. 36), and a bequest of it to a charity is void under the Act (n). So, is a like bequest of a legacy charged on land (o).

Section 6.

(6). *Death of purchaser before completion; its effect on relative rights of his real and personal representatives, under old, and under new law.*

Death of pur-
chaser before
completion :
its effect on
relative rights
of his real and
personal repre-
sentatives,
under old, and
under new
law.

Upon the death of the purchaser before completion, the equitable ownership of the property contracted for (assuming it to be freehold or copyhold of inheritance) vests in his real representative, as *quasi* heir or *quasi* devisee; and until the Act amending Locke King's Act (p), he was *primâ facie* entitled to have the purchase-money paid or reimbursed to himself, out of the personal estate (q); and this although he was himself the vendor, and the purchaser's personal representative (r): and Locke King's Act (s) did not deprive the heir or devisee of his right to have the purchase-money paid out of the personal estate (t); a vendor's lien for unpaid purchase-money having been held not to be a sum charged on land, by way of mortgage within the meaning of the Act (u); but by the amendment Act (x), the word "mortgage" is to be deemed to extend to any lien for unpaid purchase-

(m) *Ubi supra*; see Sug. 187, 191.

(n) *Harrison v. Harrison*, 1 Russ. & M. 71.

(o) *Brook v. Badley*, L. R. 4 Eq. 106, affirmed L. R. 3 Ch. Ap. 672. See *Lucas v. Jones*, L. R. 4 Eq. 73.

(p) See 30 & 31 Vict. c. 69.

(q) *Fletcher v. Ashburner*, 1 Bro. C. C. 497; 1 Wh. & T. L. C. 659; *Langford v. Pitt*, 2 P. Wms. 629, 632; *Broome v. March*, 16 Ves. 397, 411.

615. If the executor complete, and take the conveyance in his own name, he will be a trustee for the heir or devisee: *Alley v. Alley*, Moe. 262.

(r) *Coppin v. Coppin*, 23 P. Wms. 291.

(s) 17 & 18 Vict. c. 113.

(t) *Heed v. Heed*, 3 Jar. N. S. 684.

(u) *Barrett v. Hodgson*, 1 Drew. & Sum. 255.

(x) See 30 & 31 Vict. c. 69, sect. 2.

money upon any lands or hereditaments purchased by a testator (y). The heir or devisee has the same disposing power over the estate as his ancestor or testator had (z).

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Where a trustee for sale bought the trust estate at an auction, and died intestate before completing the purchase, it was held that his heir had no equity as against the next of kin to have the purchase-money paid out of the personal estate (a).

As in the case of the vendor, so also in the case of the purchaser, the question between real and personal representatives is this, *viz.*: whether at the time of his decease, he was, either absolutely or conditionally, under a binding contract to purchase: if absolutely bound, or if conditionally or optionally bound, and the condition upon which the liability was to become absolute be subsequently fulfilled, or the vendor's option to sell be declared, the real representative is entitled (b). And his rights will not be affected by anything subsequent to the death of the purchaser: so that if by such subsequent matter, (*e.g.*, the felling of ornamental timber by the vendor,) the contract cease to be binding on the purchaser's representatives (c), or be actually rescinded by the vendor on the ground of delay after the purchaser's decease (d), or in exercise of a power reserved by the contract (e), his real representative is nevertheless entitled to the purchase-money. And, it is conceived, the fact of the contract not being binding on the vendor at the time of the purchaser's death, does not affect the above rules.

Relative rights of real and personal representatives depend on his liability to perform contract.

If, however, the contract gave the purchaser a mere option, which he had not declared at the time of his decease; or, if, If not liable his real representatives had

(y) *Vide infra*, Ch. XIV. sect. 9.

(z) See *Langford v. Pitt*, 2 P. Wms. 629.

(a) *Jagls v. Richards*, 28 Beav. 361.

(b) *Buckmaster v. Harrop*, 13 Ves. 456; and see *Earl Radnor v. Shafto*, 11 Ves. 484; *Savage v. Carroll*, 1 Ba.

and B. 265, 281.

(c) 1 Jarm. on Wills, 49; and see *Broome v. Monck*, 10 Ves. 597, 604.

(d) *Whittaker v. Whittaker*, 4 Bro. C. C. 81; and see 10 Ves. 599.

(e) *Hudson v. Cook*, L. R., 13 Eq., 417.

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no claim on
his personal
estate.

through want of title in the vendor or any act or omission on his part, the agreement, although intended to be binding on both parties, was, at the time of the purchaser's death, binding only upon the vendor, the real representative of the purchaser has no claim upon the personal estate for the unpaid purchase-money; and a bill filed by him against the personal representatives and the vendor, will be dismissed (*f*): but, upon principle, it would seem that, if he chose to pay for the estate out of his own pocket, he might enforce the contract against the vendor unless the clause of option were so worded as to be confined to the purchaser individually.

Where a defective title was not made good until after the purchaser's death, though the defect might have been remedied in his lifetime, his real representative was held entitled to have the purchase-money paid out of the personal estate (*g*); so, where the owner of a piece of land contracted with a builder for the erection of a house upon it, but died intestate before it was completed, his heir was held entitled to have the house completed at the expense of the personal estate; even though the contract was not enforceable in Equity (*h*).

Relative
rights of heir
and devisee
under old
law.

The relative rights of the heir and devisee of the purchaser, in cases falling within the old law, seem to depend on the following rules:—

Right of
devisee de-
pendent upon

A purchaser, upon entering into the contract, became entitled to dispose, by will, of all his rights under it (*i*). If,

(*f*) *Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. 597; *Collier v. Jenkins*, 1 You. 295; Sug. 193. But the devisee of an estate not contracted for, but only directed by the will to be purchased, is entitled, if the purchase cannot be effected, to have the money which the testator so appropriated laid out in the purchase of another estate; see *Deventry v. Deventry*, 2 Atk. pp. 366, 369; *Broome*

v. Monck, 10 Ves. 602.

(*g*) *Garnett v. Acton*, 26 Beav. 333.

(*h*) *Cooper v. Jarman*, L. R. 3 Eq. 98. See *Brace v. Wether*, 25 Beav. 348. See as to settlements carrying out agreement for partition on the death of a co-owner, *Re Tinn*, L. R. 7 Eq. 434; and as to building contracts and whether they are enforceable in Equity, *vide infra*, Ch. XVIII. s. 1.
(*i*) *Atcherley v. Vernon*, 18 Mod.

however, the contract were not, at the date of the will, binding upon the vendor, (either absolutely or subject to a condition or option subsequently fulfilled or declared,) it conferred on the purchaser no enforceable rights; and his will was therefore inoperative: and any interest subsequently acquired by him in the property descended on his heir (k). A clear indication, however, of the testator's intention that the devisee should take, either the particular lands, or, generally, all subsequently purchased lands, was sufficient to put the heir to his election between the descended land and any provision made for him by the will (l): and this even as regards a will coming into operation before the 3 & 4 Will. IV. c. 106, s. 3; although in such a case the heir in fact took by descent and not by devise (m). If, however, at the date of the will, the contract were binding as against the vendor, the purchaser's devisee became entitled to the benefit of it (if remaining unperformed at the purchaser's decease); but his right to have the purchase-money paid out of the personal estate depended, as above shown, upon the question whether the contract were binding as against the purchaser at his decease; and, if this were so, it is conceived that the devisee would (as against the heir), be entitled, although the contract were not binding upon the purchaser at the date of the will. If the contract were performed by the vendor in the purchaser's lifetime by a conveyance to the latter in fee (n), or to a trustee for him (o), (or, perhaps, to the common uses to bar dower in his favour, in cases where the contract was for a conveyance to him or such uses as he should appoint (p).) the devisee was

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contract being binding on vendor.

But will might put him to his election.

Devisee might be entitled to estate, but have to pay for it.

Cases in which conveyance to purchaser revoked devise.

518, 528; *Broome v. Monk*, ubi *supra*; *Rose v. Cunynghame*, 11 Ves. 550; *Gaskarth v. Lord Louth*, 12 Ves. 107; *Sug.* 183, 184; *Morgan v. Holford*, 1 Sm. & G. 101.

(k) *Rose v. Cunynghame* ubi *supra*; *Duckie v. Baines*, 6 Sim. 525.

(l) *Thellusson v. Woodford*, 18 Ves. 209; *Churchman v. Ireland*, 4 Sim. 250; 1 R. & M. 250; but the legatees have no lien on the land for such part of the personalty as he im-

properly receives; *Greenwood v. Penny*, 12 Beav. 403.

(m) *Schroder v. Schroder*, Kay, 578; *affd.* 3 Eq. R. 97.

(n) See *Parsons v. Freeman*, 3 Atk. 741, 749; *Harwood v. Oglander*, 6 Ves. 190, 220; *S. C.*, 8 Ves. 106, 127.

(o) See *Jenkinson v. Watts*, Loft, 609, 615; *Rose v. Cunynghame*, 11 Ves. 554.

(p) *Sug.* 183.

a general devise of all lands within a specified locality, to lands subsequently purchased within the same locality (e).

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In cases of wills falling within the operation of the late Act, the above questions between the heir and devisee are settled in favour of the latter, by the provision which makes the devise operate upon the testator's interests as they exist at the time of his death.

Effect of
1 Vict. c. 26,
on relative
rights of heir
and devisee of
purchaser.

It has, however, been held that property will not, by virtue of the Act, pass under words of specific description, which, though applicable at the death, were inapplicable at the date of the will (f); thus a devise in 1844 of "all my Quendon Hall estates in Essex" (parol evidence being admitted to show what was comprehended in that description at the date of the will), was held insufficient to pass certain small additions to the property, which had been contracted for, but not actually purchased (g) but where there was a specific devise of "my mansion and estate called Cleeve Court," followed by a residuary devise, and the testator at the date of his will had contracted to buy an adjoining estate which was afterwards conveyed to him, and he subsequently bought other small properties, it was held by V. C. Malins (parol evidence being admitted to show what was comprehended in the description at the date of the will and the death), that the subsequently acquired properties passed under the specific devise (h); so where there was a specific devise of "all my messuage partly freehold and partly leasehold, No. 3, C. Street," followed by a residuary devise, and the testator subsequently purchased the reversion in fee of the leasehold portion, it was held that the whole messuage

Where specific description is applicable at date of death, but not at date of will.

(e) *Barnes v. Crooke*, 1 Ves. J. 436.

(f) *Emme v. Smith*, 3 De G. & S. 722; and see *Cole v. Scott*, 1 Mac. & G. 518; *Douglas v. Douglas*, Kay, 400; *O'Toole v. Brown*, 3 El. & B. 572; but see *Wagstaff v. Wagstaff*, L. R. 6 Eq. 229; and, as to republica-

tion, s. 34; and *Wilson v. Eden*, 5 Exch. 752, 766.

(g) *Webb v. Byng*, 1 K. & Jo. 580, *sed quere*.

(h) *Castle v. Fox*, L. R. 11 Eq. 542; and see the V.-C.'s comments on *Cole v. Scott*, and *Corble v. Byng*.

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passed by the specific devise (i), and the use of the pronoun "my," in the description of the thing given, is not sufficient evidence of an intention that the will shall not speak as from the date of the death (k): nor, in the case of a residuary gift, does the adverb "now" always have that effect (l).

**Contract not
presumed as
against heir.**

Where a will, under the old law, bore date only a few days before the conveyance, the Court refused to presume the existence of a binding contract prior to the will, even although for a long period no claim had been made by the heir (m).

**Effect, under
old law, of
purchase of
fee by termor;**

Under the old law, upon a binding contract for purchase of the inheritance by a person possessed of a beneficial term for years, the term, although specifically bequeathed by a prior will, became attendant on the inheritance; so that, on the death of the purchaser, even before conveyance, his legatee of the term was merely a trustee for his heir (n): the intervention, however, of any intermediate estate, unless held in trust for the purchaser (o), would seem to prevent the operation of the rule (p): and the rule that the term became attendant was merely one of presumption, which might be rebutted by evidence of a contrary parol declaration by the purchaser (q).

**and under
1 Vict. c. 26.**

It seems probable that, in cases governed by the new law, a contract for purchase, not completed by conveyance, would, in Equity, defeat (as before) the rights of a party claiming the term under a general bequest; but would not (except in

(i) *Miles v. Miles*, L. R. 1 Eq. 402; *Corbett v. Bennett*, L. R. 6 Eq. 422; and *see Hibon v. Hibon*, 9 Jur. N. S. 511; *re Midland R. Co.* 34 Beav. 525.

(k) *Miles v. Miles*, *ubi supra*. As to a residuary devise being still specific under the old law with reference to the payment of debts, see *Hensman v. Fayer*, L. R. 3 Ch. Ap. 420; *Gibbins v. Eyre*, L. R. 7 Eq. 2; *Lancefield v. Goulden*, L. R. 10 Ch. Ap. 136, reversing *NY, C. B.*, L. R. 17 Eq. 556;

and *infra*.

(l) *Wagat v. Wagat*, L. R. 8 Eq. 229; and *see* 34 Beav. 527.

(m) *Cuthbert v. Eade*, 4 De G. & S. 527.

(n) *Gallon v. Hancock*, 2 Atk. 425; *Capel v. Girdler* Ves. 509.

(o) *Whitchurch v. Whitchurch*, 2 P. Wms. 236.

(p) *Scott v. Penkoulde*, 1 Bro. C. C. 69; 9 Ves. 37; *see* 625.

cases coming within the operation of the 8 & 9 Vict. c. 112,) affect a specific legatee of the term: but even a specific legatee would lose the benefit of the bequest, if the term were actually merged by a conveyance of the fee to the testator, or became attendant on the inheritance, or satisfied and merged under the Merger Act (r).

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It need scarcely be observed, that where there is an evident intention that the term shall be kept on foot, there is no presumption of merger: as where the owner in fee purchases an existing lease, and has it assigned in trust for him, his *executors, administrators, and assigns* (s); or, where the owner of the leasehold interest, on purchasing the reversion, takes the conveyance in the name of a trustee, and expressly declares that the term shall not merge (t). Where the husband is entitled in fee, and the term comes to the wife, there is no merger during the wife's life (u).

Merger
when not
presumed.

(7.) *As to the effect of the contract in various special cases.*

Section 7.

If a mortgagee, having agreed to purchase the equity of redemption, proceed to enforce his legal title by ejectment, the existence of the contract will, unless he have improperly delayed to enforce it^(x), be a ground for refusing relief to the mortgagor under the 7 Geo. II. c. 20 (y).

As to the
effect of the
contract in
various special
cases.

Mortgagee
contracting
to purchase
may enforce
his legal title.

Contract for
sale by mort-
gagee under
power.

It has been held, that the fact of a mortgagee, with power of sale, having contracted to sell part of the mortgaged estate for a sum exceeding the amount due on the security, is no ground for restraining him from bringing an action for recovery of the mortgage debt (z).

An agreement by A., a tenant in possession, to purchase of B., is a sufficient *prima facie* evidence of B.'s title to enable

Agreement by

(r) But see *Miles v. Miles*, L. R. 1 210; affd. L. R. 2 Ch. Ap. 133.
Eq. 462, *et quare*.

(u) *Jones v. Davies*, 8 Jur. N. S. 592.

(s) *Gunter v. Gunter*, 23 Beav. 571;
Tyrruhitt v. Tyrruhitt, 32 Beav. 244;
but see Sug. 625.

(x) *Skinner v. Stacey*, 1 Wills. 80.

(y) *Goodtitle v. Pope*, 7 T. R. 185.

(z) *Willes v. Levett*, 1 De G. &

(t) *Belaney v. Belaney*, L. R. 2 Eq. 392.

him, if the contract have gone off, to sustain an action of ejectment (a).

Agreement
for purchase
of lease, and
possession
taken.

Where the assignee of a lease agreed to sell it, and it was stipulated that the purchaser should not be entitled to an assignment, and he entered and retained possession until the end of the term, the latter was held bound, in Equity, to indemnify the original lessee, although no party to the agreement, against breaches of covenant committed during such possession (b).

Liability of
equitable as-
signee of a
lease.

A person who has become the equitable owner of a lease, by contract between himself and the lessee, but to whom no legal assignment has been executed, is not liable to the lessor for rent accrued, or breaches of covenant committed, during the time when he was in possession (c). The decision in this case was rested on the general ground that the relation of landlord and tenant was a purely legal one; and the circumstance that the equitable assignee had parted with the property does not appear to have been considered material.

Agreement
by lessor for
purchase of
underlease.

Where a lessor becomes the equitable assignee of an underlease, he incurs, in Equity, the obligation of performing the covenants therein contained; and cannot set up their non-performance as a ground for refusing performance of a covenant in the original lease (d).

Agreement
for sale by
assignee of
lease.

Under the old law, when assignees of a bankrupt contracted to sell a lease, this fixed them as assignees of it, although the contract was subsequently abandoned; unless it were shown that it could not have been enforced (e). Where the assignees,

(a) *Doe v. Burton*, 16 Q. B. 807.

(b) *Close v. Wilberforce*, 1 Beav. 112; see *Sanders v. Benson*, 4 Beav. 350; and *Moore v. Greg*, 2 Ph. 717, 721, 723.

(c) *Cox v. Bishop*, 3 Jur. N. S. 409; 7 Do G. M. & G. 315; see judgment; and compare *Wright v. Pat*, 12 B. 1234, 408, case of mining

lease to trustees for a public company which repudiated the lease. It was nevertheless held liable in Equity to the lessor.

(d) *Jenkin v. Parnman*, 1 Ke. 145; and see 3 Do G. M. & G. 319; *Walker v. Gillen*, 3 Deane 512.

(e) *Hastings v. Parnman*, 12 B. N. P. 3, 296.

twelve years after the date of the bankruptcy, assigned the lease, having in the meantime done nothing to adopt it, it was held that this was a sufficient acceptance of the lease; but that it was a question for a jury whether they had accepted it within a reasonable time (*f*).

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Under the Act of 1869, the trustee of the bankrupt, who fills the place of the assignee under the old law, may, where the property acquired by him under the Act consists of land of any tenure burdened with onerous covenants, or of any property which is unsaleable or not readily saleable, by writing under his hand, disclaim such property, notwithstanding that he has endeavoured to sell the same, or has taken possession thereof, or has exercised any act of ownership in relation thereto (*g*). The Act prescribes a limit of time within which the trustee may be compelled to exercise this right of disclaimer (*h*); and in cases falling under the new law, a contract for sale by the trustee is not an acceptance of the lease, and the question whether he has accepted it within a reasonable time cannot arise.

Agreement
for sale by
trustee of
bankrupt
under the new
law.

A contract for sale by a joint-tenant seems to be, in Equity, a severance of the joint-tenancy (*i*). Joint tenancy.

The co-ownership of a common right, as, *e.g.*, of fishing on a lake, is not a *ius individuum*, even where merely appurtenant to land; but any one of the joint owners may alien his right, either wholly or in part, though not so as to prejudice the enjoyment of his co-owners (*k*).

Co-ownership
of a common
right.

A contract for sale by a single man, was, in cases subject to the old law of dower, sufficient in Equity to exclude the Dower.

(*f*) *Mackley v. Pattenden*, 7 Jur. N. S. 1955.

(*g*) 32 & 33 Vict. c. 71, s. 23, and *vide suprd.* p. 254.

(*h*) Sect. 24; and see Bankruptcy rules, 1871, r. 28; and *Ex parte Love- ring*, L. R. 9, Ch. Ap. 586.

(*i*) *Brown v. Raindle*, 3 Ves. 256, 257; *Freen v. Relfe*, 2 Bro. C. C. 220, 224; *Kingsford v. Ball*, 2 Gif. App. 1.

(*k*) *Menzies v. Macdonald*, 2 Jur. N. S. 575.

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Under old law.

claim to dower of a wife whom he married before the conveyance (l). Whether the contract by a mortgagee in fee for the purchase of the equity of redemption let in his wife's dower, seems to be somewhat doubtful (m): but such a contract does not appear to merge the security as in favour of mesne incumbrancers (n).

In one case, where the purchaser elected to take the estate with a compensation, specific performance of the contract was enforced against a vendor, whose wife, entitled under the old law, refused to release her right of dower (o).

Under new law.

Under the new law (p), the contract for purchase lets in the dower of the purchaser's wife; but she may be deprived of it in any of the various ways specified in the Act (q): as regards copyholds, the right to freebench does not attach until actual admittance (r). On the other hand, the contract for sale binds the dower of the vendor's wife, unless he have before marriage agreed not to bar her dower (s).

Legacy duty.

It has been thought that in the case of a mere power of sale under a will, where the proceeds of sale are to remain personal estate, the contract would let in the Crown's claim to legacy duty (t): but according to a modern decision of the House of Lords this is so only when the power is so worded as, in the events which occur, to be in effect equivalent to a trust; and a mere discretionary power of conversion for the convenience or benefit of the parties beneficially interested, does not let in the duty, although a sale be actually effected (u).

(l) *Lloyd v. Lloyd*, 2 Con. & L. 592.

(m) See and consider *Knight v. Frampton*, 4 Beav. 10; and *Fluck v. Longmate*, 8 Beav. 420.

(n) *Bailey v. Richardson*, 9 Ha. 734; *et vide infra*, Ch. XV. s. 7.

(o) *Wilson v. Williams*, 3 Jur. N. S. 810.

(p) s. 3 & 4 Will. IV. c. 105, which affects only women married after January 1st, 1834, s. 14, and does not affect freebench.

(q) Sects. 2 to 10: see sect. 11.

(r) *Smith v. Adams*, 18 Jur. 968; 18 Beav. 499; 5 De G. M. & G. 712; but see *Spyer v. Hyatt*, 20 Beav. 221, where the intestate appears not to have been admitted.

(s) Sect. 11.

(t) See *Att.-Gen. v. Simcox*, 1 Ex. 749; and see 6 Exch. 43; and *Att.-Gen. v. Mangles*, 5 M. & W. 130.

(u) *Att.-Gen. v. Smith*, 1 Macq. H. L. C. 760.

So, where the proceeds are to be reinvested in land, so that the property, although in fact converted, will remain land in contemplation of a Court of Equity, it has been decided that no duty attaches, although a sale be actually effected, and the will contain a power of interim investment in the funds or on mortgage, and the parties elect to take the property as money (x). And, on the other hand, an absolute trust for sale, although not acted on, lets in the duty (y): the test of liability being the equitable nature of the property at the time of the death. It has been held, that where a will contains a discretionary power of sale, and a sale is made by the Court, the question of liability depends upon whether the Court acted by directing the trustees to exercise their discretionary power, or sold under its own general jurisdiction (z); the duty not attaching in the latter case: but, as we have seen (a), the present doctrine seems to be, that a mere discretionary power, although acted on, does not let in the claim to duty.

By the Succession Duty Act (b), the duty imposed by the Act is made a first charge on the property; and every person in whom the same is vested by alienation or other derivative title at the time of the succession (c) becoming an interest in possession, is personally accountable to the Crown for the duty payable in respect of such succession (d): but every receipt and certificate, purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof, exonerates a *bond fide* purchaser for value, and without notice, from such duty, notwithstanding any suppression or misstatement in the account, or any insufficiency in the assessments; and no *bond fide* purchaser for value under a title, not appearing to confer a succession,

Succession
duty.

(x) *Heale v. Knight*, 22 L. J. 358;
Miles v. Jennings, 8 Exch. 830.

(y) *Att.-Gen. v. Holford*, 1 Pr. 426;
Williamson v. Adv.-Gen. 10 Cl. & F.
1; and see *Att.-Gen. v. Brunning*, 8
H. L. C. 243.

(z) *Hobson v. Neale*, 8 Exch. 308;
17 Beav. 178.

(a) *Supra*, p. 274.

(b) 16 & 17 Vict. c. 51.

(c) As to what is a succession, see
Wilcox v. Smith, 4 Drew. 40; *Re Love-
lace*, 4 De G. & Jo. 340; *Re Jenkinson*,
24 Beav. 64.

(d) See Sects. 42, 44.

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On appointment under a general power.

is subject to any duty which may be chargeable upon the property by reason of any extrinsic circumstances of which he has no notice at the time of his purchase (e). In one case, where it was doubtful whether succession duty or legacy duty was payable, a certificate from the Inland Revenue Office that the latter duty had been paid, was held to have discharged the land (f). The donee of a general power of appointment under a disposition taking effect upon the death of any person dying after the commencement of the Act is to be deemed entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and the appointee under a limited power of appointment under such a disposition, who takes any property by the exercise of such a power, is to be deemed to take the same as a succession from the person creating the power as predecessor (g). The Act does not expressly provide how the succession of an appointee, under a *general* power of appointment, which has taken effect on a death happening after the commencement of the Act, is to be treated as derived; but the Court of Exchequer has held, that in such a case the interest of the appointee is to be taken as derived from the donee of the power (h). Consistently with the above-mentioned rules as to legacy duty, the Succession Duty Act provides, that the interest of any successor in moneys to arise from the sale of real property (which includes leaseholds) (i) under any trust for the sale thereof, so far as the same are not chargeable under the Legacy Duty Acts, shall be deemed to be personal property chargeable with duty under the Succession Duty Act; but, if subject to any trust for the reinvestment thereof, such moneys are to be deemed real property, and

(e) Sect. 52.

(f) *Earl Hove v. Earl of Lichfield*,
L. R. 2 Ch. Ap. 155; affirming M. R.
L. R. 1 Eq. 641.

(g) Sect. 4; and see *Re Lovelace*, 4
De G. & Jo. 340; 23 L. J. Ch. 489;
Re Wallop's Trust, 1 De G. J. & S.
656.

(h) *Att.-Gen. v. Upton*, L. R. 1 Ex.

224, and cases there cited; and compare *In re Barker*, 7 H. & N. 109;
Att.-Gen. v. Floyer, 9 H. L. Ca. 477;
and generally on the Act, see *Ring v. Jarman*, L. R. 14, Eq. 357; and the comments in that case on *Att.-Gen. v. Gell*, 3 H. & C. 615.

(i) See sect. 1.

chargeable with duty as such (*j*). In the case of settled property, powers of sale, exchange, and partition may still be exercised, and the sale moneys or properties received in substitution or severalty become liable to the duty (*k*); and it has even been held that when an estate was settled subject to a jointure (the cesser of which would involve the payment of duty), and with the concurrence of the jointress, was sold by the trustees of the settlement in exercise of a power of sale therein contained, the liability to succession duty was shifted from the land to the money; although the power of sale did not override, but was overridden by, the jointure (*l*).

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The following points which have arisen on the Act, in addition to those noticed above, are deserving of attention. On the sale of a reversion, or of an estate subject to a periodical charge, the duration of which depends upon a life or lives, the purchaser is, as between himself and the vendor, liable to bear the duty, unless there is an express stipulation to the contrary in the contract (*m*). In the decided case, the vendor was a trustee with power of sale; but the decision was based on the general ground that the purchaser had bought the right to succeed on the death of the tenant for life, and that this carried with it the tax on the succession. In the common case of a tenant for life and remainderman conveying the property in fee, it remains liable in the hands of the purchaser to the payment of the duty on the death of the tenant for life. The Act, however, gives the commissioners a discretionary power to commute the duty (*n*); and the purchaser should either see that this is done before the completion of his purchase, or insist on a sufficient indemnity from the remaindermen or reversionsers. As between themselves and the purchaser, the liability of these parties to commute the duty would seem to depend upon whether the purchaser bought with notice of the state of the title being such as would *prima facie* involve the

Cases on the
Succession
duty.

On sale by
tenant for
life and
remainder
man.

(*j*) Sects. 29, 30.

Ch. Ap. 501.

(*k*) Sect. 42.

(*m*) *Cooper v. Trewby*, 28 Beav. 194.

(*l*) *Dugdale v. Meadows*, L. R. 6

(*n*) Sect. 41.

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liability to the duty. If a tenant in tail in remainder bars the entail, and re-settles the property in his own favour, he must, on the death of the tenant for life, pay the same duty as if he had taken under the original settlement; but if, on disentailing the property, he absolutely alienates it, the liability is shifted on to his purchaser (o). The appointee under a general power of appointment contained in a British settlement, which is exercised by will, is liable to the duty, notwithstanding the foreign domicile of the donee of the power (p); but neither legacy duty nor succession duty is in the first instance payable in respect of legacies given by the will of a person domiciled abroad (q); the distinction being that in the former case the appointee takes by virtue of a settlement which must be governed by English law, while in the latter case the legatees derive their title solely under the foreign will. For the purposes of taxation, the value of the property is to be ascertained at the time when the interest of the successor accrues; so that if it has then no saleable, or actual or potential annual value, it is incapable of assessment under the Act (r); and the beneficial enjoyment mentioned in the 21st section, is the enjoyment of the possessor in his own right, and for his own benefit, and not as trustee for another (s).

(o) *Braybrooke v. Att.-Gen.*, 9 H. L. Ca. 150.

(p) *Re Lovelace*, 4 De G. & Jo. 340; *Re Wallop's Trust*, 1 De G. J. & S. 656; *Re Caperielle*, 2 H. & C. 985; *Re Badart's Trusts*, L. R. 10 Eq. 288.

(q) *Wallace v. Att.-Gen.*, L. R. 1 Ch. Ap. 1; but see comments on this case in *Att.-Gen. v. Campbell*, L. R. 5 E. & Ir. Ap. 524; and see this case also as to the liability to duty in respect of any devolution of the property after the purposes of administration have been satisfied, and the fund has been invested in this country;

see also on the Act, *Att.-Gen. v. Littledale*, L. R. 5 E. and Ir. Ap. 290.

(r) *Att.-Gen. v. Earl of Sefton*, 11 H. L. Ca. 257.

(s) *Ib.*; and see generally on the Act cases above cited, and *Re Micklethwaite*, 11 Exch. 452; *Harding v. Harding*, 2 GIL 597; *Re Peyton*, 7 H. & N. 285; *Att.-Gen. v. Floyer*, 7 H. & N. 288; 10 W. R. 762; *Re Ramsey*, 30 Beav. 75; *Oldfield v. Preston*, 8 Jur. N. S. 107; *Re De Lancry*, L. R. 4 Exch. 345; and see 24 & 25 Vict. c. 92; and 26 & 27 Vict. c. 104.

CHAPTER VIII.

Chap. VIII.

AS TO THE ABSTRACT.

1. *General matters relating to the abstract.*
2. *When perfect;—what it must contain and show.*
3. *What should be furnished, in various specified cases.*
4. *As to its preparation, contents, and delivery.*
5. *As to its examination and perusal.*
6. *As to its verification.*

(1.) A PURCHASER may require to be furnished with an abstract prepared in the usual way (*a*); even although he have agreed to accept the title (*b*): he may retain it, during negotiations upon, and even after rejection of, the title, until the dispute be finally settled, for the purpose of showing the grounds of such rejection (*c*); and, in the interim, he may maintain trover for it, even against the vendor (*d*): when the contract is finally abandoned by both parties, he must return the abstract, and may not retain any copy of it (*e*): counsel's opinion and observations he may, it appears, retain if written upon separate paper (*f*); or, if written upon the abstract itself, he may erase them before returning it (*g*).

Section 1.

General matters relating to the abstract.

Purchaser's right to abstract.

His right to retain.

Must be given up, if contract abandoned.

But the purchaser of a mere contract for sale is not entitled to require his immediate vendor to show the original vendor's title (*h*); as the subject-matter of the subsale is,

Where he buys a mere contract for sale.

(*a*) *Horne v. Wingfield*, 3 Sc. N. R. 340; Sug. 406.

(*b*) *Morris v. Kearsley*, 2 Y. & C. 139; *Keyes v. Heydon*, 20 L. T. 244, V.-C. W.

(*c*) 2 Taunt. 278; Sug. 423.

(*d*) *Roberts v. Wyatt*, 2 Taunt. 268; but see *Langslow v. Cox*, 1 Chit. 93.

(*e*) 2 Taunt. 277.

(*f*) 2 Taunt. 270; but see Sug. 423, and *Alexander v. Crosbie*, 2 Ir. Eq. R. 141; a decision referable to the passage in the treatise, see 143.

(*g*) *Wood v. Court*, 2 S. Atk. Conv. 463.

(*h*) *Kintrea v. Preston*, 1 H. & N.

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not the property itself, but the rights therein of the original purchaser under the original contract. Whether the owner of a moiety of an estate to whom is given the right of preemption over the other moiety, can insist on having an abstract of the common title, has been doubted (*i*): but in the ordinary case of a surviving partner purchasing the share of his deceased partner, a stipulation that the vendors shall deliver an "abstract of their title" has been held to mean an abstract of the general title (*k*).

Vendor pays
 for.
 Except on
 sales to rail-
 way company,
 &c.

The vendor, as a general rule, pays for the abstract (*l*): but on sales to a company under the provisions of the Lands Clauses Consolidation Act, 1845, whether such sales be voluntary or compulsory, and whether made by absolute or merely statutory owners, the costs of the abstract (in the absence of agreement) are thrown on the company (*m*): and similar provisions (*n*) are contained in most of the earlier railway and other similar Acts: such costs seem to be included in any general stipulation throwing on the purchaser the costs of *the contract* (*o*).

Copy abstract.

A solicitor, who merely furnishes a copy of a former abstract, is not justified in making the usual charge for preparing an abstract *de novo* (*p*): cases, however, may often occur in which the adaptation of an old abstract to the existing circumstances of the sale may require so much skill and labour as to justify more than a mere charge for a stationer's copy, although the actual alterations may not be considerable, if estimated by their length in folios.

357, where the contract was for a lease; and see *Phipps v. Child*, 3 Drew. 709.

(*i*) See and consider *Brooke v. Garrod*, 3 K. & Jo. 603; 2 De G. & Jo. 62.

(*k*) *Morris v. Kennedy*, 2 Y. & Coll. 1.

(*l*) Sug. 406.

(*m*) 7 & 8 Vict. c. 18, s. 82.

(*n*) See *In re London and Greenwich R. Co.*, 3 Ha. 22.

(*o*) See *Ex parte Addie's Charity*, 3 Ha. 22, 25; and vide *infra*, Ch. XIII. s. 6.

(*p*) *M'Culloch v. Gregory*, 1 K. & J. 291.

(2.) *As to when the abstract is perfect ;—what it must contain and show.*

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For the purpose of conditions, &c., as to time, an abstract is said to be "perfect," if it be as perfect an abstract as the vendor is able to furnish at the time of delivery (*q*); although the title shown by it may be defective: an abstract is, in the stricter sense of the term, "perfect" or complete, when it shows a perfect title (*r*); that is, when it shows that the vendor is either himself competent to convey to, or can otherwise procure to be vested in, the purchaser, the legal and equitable estates free from incumbrances (*s*). If, on the face of the abstract delivered, the vendor has shown, say a sixty, or in the case of a contract entered into since 1874, a forty, years' title (*t*), and if for the purpose of supporting that title, it is necessary to show that a person died intestate, or any other fact—if the facts are alleged with sufficient specification on the abstract—then it *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation (*u*).

As to when the abstract is perfect ; what it must contain and show.

When "perfect," within meaning of conditions of sale.

When "perfect," as showing a sufficient title.

V.C. Kindersley's definition of a "perfect" abstract.

For instance, the non-registration of deeds, which can be registered (*x*), the existence of incumbrances, when the incumbrancers can be compelled to receive their money and join in the conveyance (*y*), the outstanding of the legal estate in a trustee (*z*), or in a married woman whose interest is bound by an order of the Court of Chancery (*a*), are not,

Certain imperfections in, not considered defects of title.

(*q*) 2 Ha. 111; and see, at Law, *Blackburn v. Smith*, 2 Exch. 783; *Steer v. Crowley*, 11 W. R. 861.

(*r*) 2 Ha. 111; Sug. 427.

(*s*) See and consider *Lord Braybrooke v. Inskip*, 8 Ves. 436; *Boehm v. Wood*, 1 Jac. & W. 419, 421; *Jumpson v. Pitchers*, 1 Coll. 13, 15; Sug. 423.

(*t*) See 37 & 38 Vict. c. 78, sect. 1.

(*u*) Per V.C. Kindersley, in *Parr v. Lovegrove*, 4 Drew. 177; and see *Oakden v. Pike*, 11 Jur. N. S. 666;

and see also *Steer v. Crowley*, 11 W. R. 861.

(*x*) *Stowell v. Robinson*, 3 Bing. N. C. 928, 935.

(*y*) *Townsend v. Champenown*, 1 Y. & J. 449; and see 2 Moll. 583; but not if their concurrence cannot be compelled; see *Page v. Adam*, 4 Beav. 269; Sug. 425.

(*z*) *Berkeley v. Daub*, 16 Ves. 330; *Sellick v. Trevor*, 11 Mee. & W. 728.

(*a*) *Jumpson v. Pitchers*, 1 Coll. 13.

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at least in a Court of Equity (*b*), regarded as imperfections of title; so if, on the completion of a contract entered into since 1874, the purchaser will have an equitable right to the production (*c*) of the deeds, the inability of the vendor to furnish a legal cost for their production is no objection to the title at Law or in Equity.

Title defective where no discharge can be given for purchase-money.

But, consistently with the terms of the above proposition, where vendors cannot give to or procure for the purchaser a valid discharge for the purchase-money, the title is defective (*d*).

Should state written consent of parties agreeing to join in sale.

And the mere statement on the face of the abstract that a party who is not compellable has agreed to join, although usual, is, it is submitted, insufficient; and, in Equity, the fact of a third party, whose concurrence is necessary, being under no legal or equitable obligation to join in the sale, has been held to be an objection, not merely of conveyance, but of title (*e*). A written agreement to concur, enforceable against the party, as being founded on a valuable consideration, should, in strictness, be procured and abstracted (*f*): nor is such agreement sufficient, if it do not absolutely bind the interest of the party signing it; *e.g.*, a title dependent on an agreement by a tenant in tail to bar his estate tail, would be imperfect (*g*): so also would be a mere agreement by a married woman, with or without her husband, to concur in respect of her interest in real estate not settled to her separate use, and over which she has no general power of appointment.

And this is not always sufficient.

Must show where outstanding legal estate is vested.

So, if the legal estate be outstanding, the abstract must show in whom it is vested (*h*); but it has been held in

(*b*) But see, at Law, *Hanslip v. Padwick*, 5 Exch. 622, 623.

(*c*) 33 & 34 Vict. c. 78, sect. 2, sub-sect. 3.

(*d*) *Forbes v. Peacock*, 12 Sim. 538.

(*e*) *Bedale v. Stephenson*, 6 Mad. 266; and see *Douglas v. L. N. W. R.*

Co., 3 K. & Jo. 161.

(*f*) See *Nock v. Newman*, *infra*, Ch. XVIII. s. 9; *Phillips v. Edwards*, 33 Beav. 440.

(*g*) *Lewis v. Guest*, 1 Rom. 325; 3 & 4 Will. IV. c. 74, s. 47.

(*h*) *Wyne v. Griffith*, 1 Rom. 283.

Equity that if the legal estate be traced to a deceased trustee, the abstract is sufficient, although it fail to point out his representative (*i*): whether the same rule would prevail at Law seems to be doubtful (*k*).

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Where an estate is sold free from land-tax, the abstract should set out the certificate of redemption, unless there is a condition binding the purchaser to accept less conclusive evidence (*l*). The existence of land tax, or insufficient proof that it has been redeemed, renders the title bad at Law, if the estate is sold free from the tax (*m*). Where the estate is sold subject to the tax, its existence need not be mentioned; though it is usual and convenient to specify the amount in the particular: a statement so made must of course be verified. Where it is sold free from tithe, the ground of exemption from tithe must be shown by the abstract.

Must show that land-tax has been redeemed where the estate is sold free from the tax.

The expression used by Lord Eldon (*n*) is, that the abstract is complete, "whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser:" it was, however, suggested in the two first editions of this work that, at least in a Court of Law, it would not be sufficient for the abstract to show merely a future (although certain and early) right to the property; and that the existence of an incumbrance which cannot be discharged on or before the time fixed for completion (*o*), would amount at Law to a defect of title (*p*): but in a modern case, where the vendor, who was not bound to convey the estate by any par-

Showing future right to property, insufficient at Law: *scilicet*.

As in case of mortgage which cannot be discharged.

(*i*) *Avarne v. Brown*, 14 Sim. 303; *Berkley v. Dunk*, 16 Ves. 380; and see *Jumpson v. Pitchers*, 1 Coll. 13.

(*k*) See *Hanslip v. Padwick*, 5 Exch. 623.

(*l*) As *eg.* a copy of the register, or a statutory declaration that the tax has not been paid for a certain number of years.

(*m*) *Buchanan v. Poppleton*, 4 Jur. N. S. 414; 4 C. E. N. S. 40.

(*n*) 8 Ves. 436.

(*o*) See (a case depending on the specialty of the contract) *Forster v. Hoggart*, 15 Q. B. 155. A mortgagee, we may remark, need not receive his money before the day fixed for redemption, although previously tendered with interest up to such day: *Brown v. Cole*, 14 Sim. 427.

(*p*) See *Hanslip v. Padwick*, 5 Exch. 615; and compare *Webb v. Austin*, 8 Man. & G. 701.

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Incum-
brances ;
whether a
defect in title
in Equity.

Title good,
although im-
mediate con-
veyance not
procurable.

ticular day, deduced a good title to the equity of redemption, the existence of mortgages affecting the property was held not to be a defect of title; although they were not mentioned in the contract, and no notice had been given of the intention to pay them off (*q*). In Equity, as a general rule, mortgages and other incumbrances are considered merely matters of conveyance (*r*): and this doctrine has even been extended to cases where the property was mortgaged to an amount considerably exceeding its value (*s*): they seem, however, to have been decided on the principle that the vendor had the legal power, if he used the necessary means, of procuring a conveyance; and the conclusion would, it is conceived, be different, if, by reason of an agreement for the continuance of the charge, or otherwise, the vendor had no right to call on the incumbrancer to join in the conveyance (*t*). The equitable doctrine as to the consolidation of securities furnishes a strong argument against the obligation of a purchaser to accept the conveyance of a mere equity of redemption instead of an unincumbered estate (*u*). Lord Langdale observes, on the general question, "Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the court considers it a question of conveyance only; but I think it has never gone further than that" (*v*): in which it seems to be assumed that the right is capable of being satisfied at the time when the question of title or no title arises. At any rate it may be considered that the title is perfect, whenever it appears that under the contract the purchaser either already has, or will necessarily, before the time fixed for completion, be able to acquire an immediate and indisputable right to the legal and equitable estates; even although the absence of parties

(*q*) *Savery v. Underwood*, 23 L. T. 141, Q. B.

(*r*) *Townsend v. Champernown*, 1 Y. & J. 449.

(*s*) *Stephens v. Guppy, and Rawson v. Tadbury*, cited 1 Y. & J. 450.

(*t*) See 2 Moll. 523; 4 Beav. 269.

(*u*) See and consider *Berry v. Lust*,

L. R. 4, Eq. 537. The 7th sect. of the 37 & 38 Vict., c. 78, does not affect the equitable right to consolidate. This sect., it is understood, is about to be repealed.

(*v*) *Sidbotham v. Barrington*, 3 Beav. 523.

or other circumstances, may considerably delay the conveyance (y).

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It has, in fact, been held, that the Master, under the old practice, was warranted in finding that a good title was deduced, when it appeared by the abstract that the vendor was tenant in tail in possession, and able to convey the fee simple by an enrolled conveyance (z): this decision, so far as it may tend to establish, for it by no means decides, that such a vendor is not bound at once to execute a disentailing assurance, and limit the fee simple either to his own use or to his appointment, seems open to observation. It is clear that his contract would give to the purchaser no right which he could enforce in the event of the vendor's death before the execution of the conveyance; which sufficiently distinguishes it from the case put by the plaintiff's counsel, of a contract entered into by a tenant for life with a power of sale: for a contract to exercise such a power, if entered into for valuable consideration, would be enforced in Equity against the issue in tail and remaindermen (a): whereas, in the case of the tenant in tail, the jurisdiction of Equity is expressly excluded by Statute (b): and it seems unreasonable that a purchaser should be put to the expense of investigating the title and preparing his conveyance, when the death of the vendor would deprive him of the estate, and possibly leave him without available remedy for recovery of his costs, and deposit (if any has been paid). These remarks apply more forcibly where a future day is fixed for completion; before which the vendor is not bound to convey; so that it does not rest with the purchaser to get rid of the state of uncertainty by at once accepting the title and taking a conveyance. In such a case the title deduced is not, it is submitted, with reference to the terms of a contract, stipulating for a conveyance, *in futuro*, an absolutely good title; but a

Whether
sufficient if
abstract
merely show
that vendor is
tenant in tail
in -----

(y) As to when a good title is first shown, see *Sherwin v. Shakespeare*, 17 Beav. 267; 5 De G. M. & G. 517; *Bridges v. Longman*, 24 Beav. 27; *Parr v. Lovegrove*, 4 Drew. 177; *Lyle*

v. Earl of Yarborough, Johns. 70.

(z) *Cattell v. Corrall*, 4 Y. & C. 228.

(a) Sug. Pow. 557.

(b) 3 & 4 Will. IV. c. 74, s. 47.

Chap. VIII. title defeasible in the event of the vendor's death before the
 Sect. 3. time fixed for completion.

Section 3.

(3.) *As to what abstract should be furnished in various cases.*

As to what abstract should be furnished in various cases;
 on purchase by a tenant in common or a copartner.

If one tenant in common purchase of another, he is entitled to an abstract of their general title, if the vendor stipulates in general terms for the delivery of an abstract (c); but, in the absence of such a stipulation, it seems doubtful whether he can require more than an abstract showing his vendor's separate title (d).

On purchase of allotment.

Upon the sale of lands allotted under an Inclosure Act, the abstract down to the award, must be that of the title to the lands in respect of which the allotment was made (e): and when the allotment has been made indiscriminately in respect of lands held under different titles, all such titles must be shown by the abstract (f). It may be observed that if the Act omits the usual clause assimilating the tenure, an allotment is freehold; although made in respect of customary lands: and this, notwithstanding the Act directs that allotments shall be held to the same uses, &c., as the lands in respect of which they are allotted (g).

Tenure of allotments.

Of land taken in exchange.

Where the estate has been taken in exchange at common law, or under mutual conveyances with eviction clauses, the abstract must, down to the exchange, show the titles to both estates (h); unless, in the case of a common law exchange, (as to the future operation of which see 8 and 9 Vict. c. 106, s. 4.) the estate given in exchange has since been aliened (i), and the vendor can prove the alienation.

(c) *Morris v. Kearsley*, 2 Yo. & Coll. 139.

(d) *Lane v. Lane*, 9 Jur. 745; and see *Phipps v. Child*, 3 Drew. 709; *Brooke v. Garrod*, 3 K. & Jo. 608; 3 D. G. & Jo. 62.

(e) Sug. 572.

(f) See and consider *King v.*

Moody, 2 Sim. & St. 570; *Major v. Ward*, 5 Ha. 604.

(g) *Doe v. Davidson*, 2 Man. & Sel. 175; *Doe v. Hillard*, 9 Barn. & Cr. 789.

(h) *Bastard's case*, 2 Rep. 121 a Sug. 372.

(i) 1 Jarm. Conv. by S. 75.

Where the estate has been taken in exchange under the Acts authorizing the exchange of ecclesiastical property (*k*); or under an Inclosure Act, or the provisions of the 4 & 5 Will. IV. c. 30 (authorizing the exchange of Common Lands,) the title down to the exchange must be that of the estate given in exchange. Lord St. Leonards, in fact (speaking of exchanges under Inclosure Acts) states, that "the title of the person holding the estate is the only one relating to it" (*l*): this may be admitted if the validity of the exchange be assumed: but, as such exchanges, and also exchanges of common-field land under the 4 & 5 Will. IV. c. 30, are only authorized to be made by or with the consent in writing of persons having certain specified interests in both estates (*m*), it is conceived that, in such cases, an abstract can scarcely be regarded as perfect, unless it disclose at least so much of the prior title to the estate taken in exchange as may be sufficient to show that the transaction was within the provisions of the Act. But where the estate has been taken in exchange under the general provisions of the Commons Inclosure Act, 8 & 9 Vict. c. 118 (*n*), the single title alone seems necessary; as the Act contains a clause making the award, when confirmed, conclusive evidence that the directions of the Act have been complied with, and declaring that every

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Of land taken
in exchange
from the
Church or
under Inclo-
sure Acts.

(*k*) 55 Geo. III. c. 147, *see* s. 3; and 56 Geo. III. c. 52; 1 Geo. IV. c. 6; and 6 Geo. IV. c. 8. See, as to confirmation of void exchanges, by the tithe-commutation commissioners, 5 & 6 Vict. c. 54, s. 7. Exchange of charity lands held valid, although the consenting Bishop was a trustee of the charity; *Att.-Gen. v. Bishop of Worcester*, 9 Ha. 328.

(*l*) V. and P. 378.

(*m*) See 4 & 5 Will. IV. c. 30, ss. 2, 4, and 25, in which note the words, "according to the provisions," &c.; and 6 & 7 Will. IV. c. 115, s. 35. See also 3 & 4 Vict. c. 31, s. 1, which, in cases falling within the Act, makes the award conclusive evidence that the provisions of the general

Inclosure Act, and of the 6 & 7 Will. IV. c. 115, have been complied with, and that all necessary consents have been given; but, query, whether this meets the difficulty in the case of an exchange; it would rather seem to refer merely to such consents as are requisite to the validity of the *Inclosure*.

(*n*) Amended by 9 & 10 Vict. c. 70, *see* s. 11; and extended by 10 & 11 Vict. c. 111, *see* ss. 4 & 6; and 12 & 13 Vict. c. 83, *see* ss. 7 & 11; and *see* 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79, ss. 17, 31, 32; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43; and 31 & 32 Vict. c. 89.

allotment, exchange, &c., specified and set forth in the award, shall be binding and conclusive on all persons whomsoever (o); and the same may probably be the case as respects private exchanges under s. 147 of the Act (p). So, also, if the title be described in the particulars or conditions as arising under an exchange by virtue of an award under an Inclosure Act, it is sufficient if the abstract show a title by award in respect of other lands and common rights, without showing the particulars of the exchange: and if the agreement be that the title shall commence with the award, the purchaser cannot require the title of the lands given in exchange for those contracted to be sold (q).

Of land taken
in exchange
from a
charity.

Where the title depends upon an exchange under the 1 & 2 Geo IV c. 92, (authorizing the exchange of charity lands,) the abstract must show the title as well to the lands given as to the lands taken in exchange; inasmuch as the right of re-entry in case of eviction is expressly reserved to the charity trustees (r); and it is conceived that the purchaser may require evidence of the land given in exchange having been quietly enjoyed by the charity.

Under the
recent Act.

Under a recent Statute (s), where the trustees or persons acting in the administration of a charity have power to determine on any sale, exchange, partition, lease, or other disposition of the charity estate, a majority present and voting at a meeting of their body duly constituted, are to have full power to execute and do all such assurances and things as may be requisite for carrying such sale, &c., into effect; and their assurances and acts are to have the same

(o) Sect. 105; as to evidence of the award, see s. 146; and see as to partitions by the commissioners, 11 & 12 Vict. c. 92, ss. 13, 14, and 15 & 16 Vict. c. 79, ss. 17, 31, 32.

(p) The commissioners appear to have power under this section to exchange gavelkind lands for lands held in fee simple. *West v. Leman*, 11 Q. B. 222; 7 B. & C. 322; 4 G. & C. 840.

(q) *Catell v. Corrahl*, 4 Y. & C. 228.

(r) See sect. 9 of Act.

(s) 32 & 33 Vict. c. 110, s. 12. This section seems retrospective. See the Acts 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 134; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112, which are, so far as consistent, to be construed with this Statute.

effect as if executed by all the trustees or administrators, and by the official trustee of charity lands. Where the title is derived under this Act, or the previous Charitable Trusts Acts incorporated with it, the abstract must show that all the statutory requirements have been complied with.

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So where land has been exonerated from tithe by an exchange under the 6 & 7 Will. IV. c. 71, s. 30 (f), the title to the land given in exchange for the tithe must be shown (u).

Of land
exonerated
from tithe by
exchange
under 6 & 7
Will. IV.
c. 71, s. 30.

The title to terms of years attendant upon the inheritance, and which are considered to have merged under the 8 & 9 Vict. c. 112, must still be traced so as to show in whom they were vested at the time when they became subject to the operation of the Act (x); viz., by abstracting, if practicable, the deed creating the terms, and the modern mesne assignments: these latter, however, may be abstracted very concisely (y): and when such deeds are numerous and voluminous, it is not uncommon for counsel when settling conditions of sale or a contract on behalf of a vendor to stipulate that such deeds shall be abstracted merely by giving their dates and a short statement of their effect, unless the purchaser chooses to have a full abstract at his own expense. The Act, it may be remarked, does not appear to extend to copyholds, customary freeholds (z), or leaseholds (a): and it has been doubted, although apparently without sufficient ground, whether the first and second sections extend to any hereditaments other than *land* ordinarily so called (b).

Of estate
which has
attendant
terms.

Upon a sale of land formerly copyhold, the abstract must trace the copyhold title, and also the lord's title to the manor, down to the enfranchisement (c): and it is suggested in a work of reputation that a purchaser may further require

Of enfran-
chised copy-
holds

(z) And see 5 & 6 Vict. c. 54, m. N. S. 1005; 1 Drew. & Sma. 412. 6 & 7. (y) Sug. 370.

(u) See 2 & 3 Vict. c. 62, s. 20.

(x) See Dav. Concise Proc. 79.

(a) *Lyle v. Earl of Yarborough*, Johns. 70, 74. As to what is a satisfied term, see *Shaw v. Johnson*, 7 Jur.

(a) See sect. 3.

(b) Dav. Q. Proc. 75, 80.

(c) Sug. 422.

evidence of the manor having, since the enfranchisement, been enjoyed conformably with the title shown by the abstract (d): such a requisition has never however come under the observation of the author of the present work, and it seems very doubtful whether if made it could be insisted on. Where the enfranchisement has been effected under the general enfranchisement Acts, it is unnecessary to show the lord's title (e).

Of leaseholds
—freehold
title must
formerly be
produced;

Previously to the 37 and 38 Vict. c. 78, the rule was that upon a sale of leaseholds, the abstract must (except in the case of a Bishop's lease (f)) show the lessor's title, as well as the subsequent title to the term (g); even although the lessors were a corporation, and the lease was one of long standing (h). The rule, as to the non-production of the Bishop's title (i), rested on the ground of the lease having been granted in a mode prescribed by an Act of Parliament, and upon the presumed notoriety arising from the use of the episcopal seal; and it would seem to apply to leases granted by a Dean and Chapter, and possibly to other cases: and the general rule did not apply when the purchaser entered into the contract with notice that the freehold title could not be produced (k); nor was it clear that the rule applied where, on the sale of a lease of great antiquity, the vendor showed the creation of the term, and deduced the leasehold title for the last sixty years (l). But now, under the recent Act, on the completion of any contract made after 1874, for the grant or assignment of a term of years, whether original or derivative, the intended grantee or assign is not entitled to call for

but not under
the V. & P.
Act, 1874.

(d) 1 Jarm. Conv. by S. 83. ✓

(e) 4 & 5 Vict. c. 35, see s. 64 of Act; and see 15 & 16 Vict. c. 51, ss. 11, 22, 33, 34, and 47; and see the saving in s. 48, *et quare*. And see sect. 10 of 21 & 22 Vict. c. 94; which repeals s. 11 of 15 & 16 Vict. c. 51; and see *Kerr v. Pawson*, 25 Beav. 394, a case under the Copyhold Act 1852; and vide *supra*, p. 160.

(f) *Fane v. Spang*, 2 Mer. 430.

(g) *Souler v. Drake*, 1 R. & M. 414.

992; *Hall v. Ratty*, 4 Man. & Gr. 410; *Clive v. Beaumont*, 1 De G. & S. 397, 406; *Gaston v. Frankam*, 2 De G. & S. 561; *Smith v. Gypson*, 7 Ha. 185. And see *Stratton v. St. John*, L. R. 2 C. P. 376.

(h) *Purvis v. Naps*, 9 Pri. 436; see p. 522.

(i) *Fane v. Spang*, 2 Mer. 430.

(k) *Sup. cit.*

(l) 1 Jarm. Conv. by s. 83.

the freehold title (n). This enactment, however, does not apply to leasehold for lives; nor, in the absence of express stipulation negating the right, does it preclude the grantee or purchaser of an underlease from calling for the title of the immediate lessor.

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Except in
what cases.

In a recent case at Law it was held that there is no difference between an agreement to grant a lease and an agreement to assign one, as regards the liability to make a good title (n). A person who agrees to let land agrees to grant a *valid* lease, just as a person who agrees to sell land agrees to execute a valid conveyance of it (o).

whether the
agreement be
to grant or
assign a lease.

Upon a sale of renewable leaseholds, if (as generally happens) the subsisting lease be expressed to be granted in consideration of the surrender of the prior lease, the abstract must show that the surrenderor was the equitable as well as the legal owner of the surrendered lease (p).

Of renewable
leaseholds.

If the lease be held for lives, evidence must, of course, be given, that the lives are in existence, and this, although there be a covenant for perpetual renewal (q).

Of leases for
lives.

Upon a sale of shares in mines, the purchaser is not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked: but he is entitled to such evidence of the constitution of the company, and of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares (r).

Of shares in
mines.

(n) 37 & 38 Vict. c. 78, sect. 2.

(o) *Stranks v. St. John*, L. R. 2 Q. P. 376; and cases cited; and see *Macbryde v. Weeks*, 22 Beav. 582.

(p) Per Willes, J., in *Stranks v. St. John*, *ubi supra*.

(q) *Coppin v. Fernyhough*, 2 Bro.

C. C. 291; *Hodgkinson v. Cooper*, 9 Beav. 304.

(r) *Anderson v. Higgins*, 1 J. & L. 718.

(s) *Curling v. Flight*, 2 Ph. 613; see 6 Ha. 41.

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Of railway
shares.

Upon the sale of railway or other shares, little evidence of title is needed (s). Until the seller has paid up all his calls, the company may refuse to register the transfer; but if they acknowledge the transferee as a shareholder, they cannot recover from him the arrears due from his vendor (t). It is the purchaser's duty to see that the transfer is registered (u); but in order fully to protect himself from all liability in respect of future calls, the vendor should see that the purchaser's name is substituted in the register (x); for if he fail to do so, his name will be put on the list of contributories in the event of a winding-up. In such a case, the vendor will be entitled to an indemnity from the purchaser, notwithstanding that the transfer may not have been registered (y).

Of pews :

in chancel.

Upon the sale of a messuage with pews claimed as appurtenant thereto, the right to the pews must be proved, either by production of the faculty, or by evidence of prescription (z). With respect to seats in the chancel, if the Rector allows seats to be erected or placed there by the parish, the same seem to be thenceforth in the same position as pews in the body of the church; and to be subject to the like jurisdiction of the Ordinary: but the Ordinary cannot interfere with pews occupied by the Rector and his family and tenants, nor, indeed, with any he has licensed; and he cannot introduce

(s) *Shaw v. Fisher*, 2 De G. & S. 11, 14; 5 De G. M. & G. 596; *Wynne v. Price*, 3 De G. & S. 310. As to specific performance of a contract for sale of shares, *vide infra*, Ch. XVIII. s. 1.

(t) *Watson v. Eales*, 23 Beav. 294.

(u) *Sayles v. Blane*, 14 Q. R. 205; *Walker v. Bartlett*, 18 C. B. 845, 861; *In re Ward and Henry's case*, L. R. 2 Ch. Ap. 431, 433.

(x) *Shepherd's case*, L. R. 2 Eq. 564; L. R. 2 Ch. Ap. 16; *Head's case*, L. R. 3 Eq. 80; *White's case*, *ib.* 86; and see *Shepherd v. Gillespie*, L. R. 5 Eq. 293; L. R. 3 Ch. Ap.

764; *Cruse v. Paine*, L. R. 6 Eq. 641.

(y) *Wynne v. Price*, 3 De G. & S. 310; *Walker's case*, L. R. 2 Eq. 564; *Head's case*, L. R. 3 Eq. 84; *White's case*, *ib.* 86. See as to the usages of the Stock Exchange, and their bearing on the contract, *Grissell v. Britton*, L. R. 4 C. P. 36; *Coles v. Britton*, L. R. 4 Ch. Ap. 3; and *vide infra*, Ch. XVIII. s. 1.

(z) See, on the right to pews, *Shalford on Statutes*, 5th ed. p. 93; and *Pepper v. Barnard*, 7 Jur. 1128; 12 L. J. N. S. Q. B. 361; *Kenny v. St. Mary, Wyllenden*, 15 Jur. 478.

pews or seats into the chancel without the Rector's consent (a).

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As to the commencement of the title,—Before the recent Act (b), the rule was that upon a sale of freeholds, or (it is conceived) of copyholds or renewable leaseholds, except where the first lease was of more recent date, the title must go back at least sixty years (c); but by the recent Act, the period of forty years is substituted for that of sixty years, subject however to the purchaser being entitled to call for a title going further back than forty years in any case where, before the passing of the Act, he might have required more than a sixty years' title (d).

Must extend
over what
period—sixty
years.

The title to an advowson must be carried back at least one hundred years (e); and the abstract should be accompanied by a list of the presentations during the period over which it extends (f). The rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for although a sixty, or now a forty, years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no destruction of the appendancy, by severance of the advowson, is disclosed by the earlier title.

One hundred
years on sale
of advowson.

We may remark here, that the word "living" is sufficient to pass the advowson; though it may be restrained by the context to the next presentation (g).

(a) Ayliffe's Paragon, 486; Degge's Parson's Counsellor, 173, 6th ed. 1703; Watson's Clergyman's Law, 388, 3rd ed. 1725; Nelson's Rights of the Clergy, 494; Prideaux's Directions to Churchwardens, 74, 75; see 1 Brown and Gould, 45, *dictum per* Lord Coke; *Clifford v. Vicka*, 1 Barn. & Ald. 498; *Morgan v. Curtis*, 3 Mann. & Ry. 389.

(b) 37 & 38 Vict. c. 78.

(c) *Cooper v. Emery* 1 Ph. 388;

Hodgkinson v. Cooper, *ubi supra*; *Finch v. Shaw*, 18 Jur. 937; 19 Beav. 500; see *Moulton v. Edmonds*, 1 De G. F. & Jo. 246.

(d) 37 & 38 Vict. c. 78, sect. 1.

(e) See 3 & 4 Will. IV. c. 27, s. 30.

(f) Sug. 367.

(g) *Webb v. Byng*, 2 K. & Jo. 669; on Ap. 2 Jur. N. S. 1242; and *H. L.* 8 Jur. N. S. 1135.

Must show
creation of
reversionary
interest on
sale thereof.

Upon the sale of a reversionary interest, whatever may be its antiquity, the abstract must go back sufficiently far to show its creation; and it should also be shown that the estate has been enjoyed in possession, conformably with the instrument which created the reversionary interest (*h*). This, however, only applies to the sale of reversionary interests commonly so called, and not to the sale of an estate subject to an attendant term, in such a case it is sufficient to show a good sixty years' (or now a forty years') title to the freehold, and to the possession of the term, abstracting also the deed creating the term, and even if this be lost, the loss is said to be immaterial (*i*).

Showing
sixty years'
title to old
term—
whether suffi-
cient.

It was stated in former editions that upon the sale of an old term of years, it is sufficient if the abstract show the creation of the term and a sixty years' title to the possession, omitting the intermediate title, and that the absence of the deed creating the term would not render the title unmarketable (*k*). However, in a recent case (*l*), where the passage in the text and the authorities on which it is based were cited, the Court of Exchequer Chamber held, that a vendor of leaseholds, who deduced a good title for more than sixty years, was bound to produce a lease dated in 1606, under which the property was held, there being nothing in the contract to prevent the purchaser from requiring its production.

On sale of
old term in
gross.

And it is conceived that in the case of the sale of an old term originally created by way of mortgage, or upon trust for raising portions, or for any other limited purpose, the abstract should set out, not only the instrument creating the term, but also those which evidence its subsistence as an absolute estate: *eg*, a decree of foreclosure, or an assignment under a power of sale in the case of the mortgage term, or

(A) 1 Jarm. Conv. by S. 61.

(B) 1 Pract. Abstr. 349.

(C) 1 Jarm. Conv. by S. 69; 1 Pract.

218. 25. 249: and see Sup. V. A. P.

14th Edn. p. 376.

(D) *Frederick v. Gooden*, L. R. 5 Q. B.

218.

an assignment on the sale of a term for raising portions. Numerous instances occur in practice in which estates really held merely for the residues of old terms of this description have for many years been dealt with and treated as freehold; and their existence constitutes a source of danger to titles which it may often be impossible to guard against by any amount of professional vigilance.

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Upon the sale of tithes held as a lay property, or of any other property held (as such tithes generally (*m*) are) under a grant from the Crown, the abstract should set forth the original grant, and then, omitting intermediate instruments, take up the history so as to show a good sixty (or now forty) years' title (*n*): so, where the tithes are considered to have been merged by the tithe-owner under the late Acts, and the estate is sold as tithe-free, the early title to the tithes must be similarly deduced (*o*); except in cases where the merger purports to have been effected by an instrument made with the consent of the Commissioners before the passing of the 9 & 10 Vict. c. 78 (*p*).

On sale of tithes or other property derived from the Crown must show original grant.

If the purchaser have agreed not to call for the legal estate, this will not shorten the period over which a title must be shown to the equitable estate; and it must also be shown that no adverse use can be made of the legal estate.

Rules not altered by the estate being merely equitable.

(4.) *As to the preparation, contents, and delivery of the abstract.*

Section 4.

The abstract must always commence with a document, of at least the requisite age, if the vendor have one (*q*): but neither can a purchaser require, nor would the vendor's

As to preparation, contents, and delivery of the abstract.

(*m*) Tithes may be held as lay property by virtue of sales for redemption of land tax.

(*n*) *Pickering v. Lord Sherborne*, 1 *Crawf. & Dix. Abr. C.* 254; 1 *Jarm. Comv.* by S. 68; *Sug.* 357. It is conceived that sect. 1 of the 37 & 39 Vict. c. 78, which in terms applies

only to a contract for sale of *land* cannot apply to a contract for the sale of incorporeal hereditaments like tithes; but see 13 & 14 Vict. c. 21, sect. 4.

(*o*) *Ibid.*

(*p*) See *Walker v. Bentley*, 9 *Ha.* 629, 632.

(*q*) 2 *Sug.* 135, 10th edit.

Chap. VIII.
Sect. 4.

Must if possible commence with a document; old deeds not to be abstracted: but must be produced if in vendor's possession.

solicitor be justified in furnishing an abstract of deeds prior in date to that which would constitute a good root of title (v). Where the root of the title, as abstracted, is insufficient, *per se* (as, e.g., in the case of a general devise without proof of the testator's seisin), the purchaser may require an inspection of the earlier title deeds in the vendor's possession; but whether he is entitled to this, as a general rule, when a good sixty—or now forty—years' title has been deduced, is considered doubtful (s). The better opinion, however, seems to be, that irrespectively of any question as to expense, and supposing the requisition is not precluded by the contract, a vendor is bound to show, so far as he can, his entire title, however ancient it may be.

Must commence with what description of document as a root of title.

As a general rule, the first abstracted documents should purport to deal with the entire legal and equitable estates in the property; or should at least afford *prima facie* evidence that the title to such legal and equitable estates was, at the date of such documents, consistent with the title as subsequently deduced: they should not be dependent for their validity upon any previous instrument; and should contain nothing raising a fair doubt whether the parties claiming the interests there purported to be dealt with, were in fact entitled so to deal with them.

Not with will containing general devise.

Thus, a general devise in a will of real estate is an insufficient root of title, there being nothing to show that the property in question was intended to, or could, have passed by it: the conveyance to the testator should be abstracted; or, if there are no earlier deeds, evidence should be furnished of his seisin at the date of his will: and even a specific devise is not an eligible root of title (t).

Whether with mortgage for a term—or a lease.

So also, it is conceived, a mortgage for a term of years, or a lease, is an improper commencement of an abstract of title

(v) 1 Jarm. Conv. by S. 63; but 180; Sug. 407.

see *Frend v. Buckley*, L. R. 5 Q.B. 213;

vide *infra*, p. 297.

(s) *Parr v. Lovegrove*, 4 Drew. 170.

(t) See *Parr v. Lovegrove*, 4 Drew. 170.

to the fee simple, where the vendor has earlier documents; unless, perhaps, in cases where, independently of the mere fact of the demise (which might be attributed to a power, or to a mere chattel interest in the grantor), the instrument contains matter which furnishes a fair presumption that he was the absolute owner in fee. A vendor, however, in possession of earlier documents, could not be advised (except under very special circumstances) to commence his abstract with a lease; as it would almost inevitably lead to expensive discussions with the purchaser. And where a lease is relied on, it is necessary, unless it expired before the time of living memory, to show that the lessee had actual possession of the estate (u).

So, also, an instrument relied upon as an exercise of a power should be preceded by the instrument creating the power; and the admittance to copyholds should be preceded by the surrender; and a recovery deed or a disentailing assurance, if it disclose an entail, by the deed creating the entail (x).

Nor with instrument dependent for its validity on previous instrument.

"If, however, such deed is lost, and possession has gone along with the estates created by the recovery for a considerable length of time, and the presumption is in favour of the recovery having been duly suffered," the loss of the deed, and want of evidence of its contents, are no objection to the title (y); and the same principle would probably apply in the case of the absence of a deed creating a power (z); or in the case of the loss of an ancient lease, on a sale of long leaseholds (a).

Except in certain cases—loss of prior instrument.

So, if the first abstracted document contain recitals or other matter throwing a reasonable doubt upon the title as respects the contents or construction of the earlier documents

Nor with document which throws a doubt on earlier title.

(u) *Clarkson v. Woodhouse*, 5 T. R. 412; Burt. Comp. pl. 428.

(x) 1 Jarm. Conv. by S. 67.

(y) *Cousmaker v. Sewell*, Sug. 366.

(z) See *Nouaille v. Greenwood*, Turn. & R. 26.

(a) But see *Frend v. Buckley*, L. R. 5 Q. B. 213, *et quere*; *supra* p. 294.

the purchaser may require the vendor, not only to produce but also to abstract, so much of the prior title as may be sufficient to remove such doubt; but, in the absence of such reasonable doubt, the mere fact of earlier documents being recited would not entitle the purchaser to an abstract of them, even where he may require their production if in the vendor's possession or power (*b*): and it is sufficient to produce (without abstracting) an instrument which is required simply "to establish a fact or negative an inference" (*c*).

Need not in all cases commence with a document.

It is not *essential* that the origin of the title should be shown either by deed or will; in the absence of documents it may be sufficient to produce evidence of such long uninterrupted possession, enjoyment and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple (*d*). But the proof of title by evidence of possession is not admissible in cases where documents forming part of the modern title are lost or destroyed: in such cases the vendor must prove their contents and execution (*e*), for which purpose, when the land is in a register county, a registered memorial is good secondary evidence (*f*).

Recitals in first document should be fully abstracted.

As a general rule, the recitals in any document which is abstracted as a root of title, should so far as it may in any way affect the estate comprised in the contract, be set out fully; even though the purchaser may be precluded from founding any requisition or objection thereon.

Wherever commence should be regularly continued.

The title, wherever taken up, should be thence continued either in chronological or some other regular order. Where separate parts of the estate are held under separate titles, such titles should, of course, be traced separately so long as they remain distinct: every subsequent document dealing

See Prosser v. Watts, 6 Madd. Jarm. Conv. by 1. 63 and 64; Cony. 566. Sug. 418.

(*c*) *Bryant v. Dick*, 4 Russ. 1; Sug. 438.

(*f*) *Centrose v. Wells*, 4 De G. & S. 527.

with the legal estate, (except expired leases, and with the exceptions already referred to (g),) should be abstracted; for instance, a mortgage and a reconveyance are not to be suppressed under the notion that the title has been thereby brought back to its original state (h); such may, or may not, have been the case; and is a point to be determined by the advisers of the purchaser, not of the vendor. All documents forming part of the title should be abstracted in chief; the introduction of them merely as recitals in other abstracted instruments, (which is not uncommon, especially in the case of wills,) is, it is apprehended, clearly improper. were it not so, a copy of the conveyance to the vendor might, in many cases, take the place of an abstract; besides which, the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in such document, but which are not noticed in the recital. It is convenient to introduce, in their proper places, direct statements of deaths, marriages, and other matters of pedigree; and not, as is frequently done, to trust to the recitals in the abstracted documents: and in cases of complicated descents, &c, a regular pedigree should accompany the abstract.

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Documents
should be
abstracted in
chief.

Statements of
matters of
pedigree.

Documents affecting merely equitable interest give rise to considerations of greater difficulty. Lord St. Leonards states generally, that the solicitor "should abstract every document upon which the title depends, or upon which any difficulty has arisen; wherever he begins the root of the title, he ought to abstract every subsequent deed" (i) this, however, it is conceived, must be understood to mean every document upon which the purchaser's title will necessarily depend. If, for instance, the vendor be possessed of a document declaring that a prior owner who purchased, apparently on his own account, was in fact a trustee, or, that a mortgage-debt was trust-money, the title of the vendor who has notice of the

Suppression
of instruments
evidencing
immaterial or
satisfied
equities—
how far
justifiable.

(g) *Supra*, p. 294.

(h) As to the danger and impropriety of suppressing a mortgage, see *Heath*

v. *Croalock*, L. R. 10 Ch. Ap. 22.

(i) Sug. 407.

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Sec. 2.

trust may depend upon various instruments which would be altogether immaterial to a purchaser destitute of such notice ; and it would, it is conceived, be unusual, and improper, for the solicitor to allow notice of such a trust to appear upon his abstract. This, however, it must be admitted, is, *pro tanto*, a departure from the general principle, that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title: but it is sanctioned by convenience and universal practice. Other cases may perhaps occur in which a document may be, without material risk, suppressed; as, for instance, where a good title is shown to the legal estate, and a charge, which clearly operated merely in Equity, has been paid off and no trace of it appears upon the subsequent title. The difference between the suppression of such an instrument and a legal mortgage is evident: the equitable charge has no operation as against a subsequent purchaser for valuable consideration taking the legal estate without notice: and his title, therefore, is not dependent on the sufficiency of the release; nor does there seem to be any good reason for making a distinction between an equitable charge by deed, and a mere memorandum accompanying an old equitable mortgage by deposit, which, except upon special grounds, is never abstracted. But, in the case of a legal mortgage, the purchaser's title at Law will depend (theoretically if not practically) upon the legal validity of the deed of reconveyance, whether its existence be known to him or not. Still, even in the case of the equitable charge, it seems at least probable that a solicitor who suppresses it, under the idea that it is unimportant to the title, does so at a risk (*h*); and it is submitted, that such a course should rarely, or never, be taken, in respect of an instrument which is so framed that it could by possibility affect the legal estate; as, for instance, a mortgage or an equity of redemption, drawn as a conveyance with a proviso for redemption; and which although merely a charge in Equity if the first mortgage be valid in Law, would yet pass

Deed which
 may operate
 on legal estate
 should never
 be suppressed.

the legal estate, supposing it not to have been effectually transferred by the prior instrument.

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But in a late case (*l*), it was held that a vendor was not justified in suppressing a letter creating an equitable charge, which was intended to be paid off; and, also, that he would not have been justified in so doing, even if the charge had been actually satisfied: and the Court, in commenting on the above passage in the text (as appearing in the 3rd edition), observed that it "must probably mean that where an equitable charge has been discharged, it may be advisable not to put it on the face of the abstract, but that he (the V-C) had no doubt that such charges ought in some way to be communicated to a purchaser." The intention of the writer, however, was not to limit the rule in the way suggested by the Court: but to lay it down generally, that where an informal equitable charge has been satisfied, its past existence may, except under special and exceptional circumstances, be altogether suppressed by the vendor's solicitor. The strict rule laid down by the Vice-Chancellor, Sir W P Wood, in *Drummond v. Tracey*, and sanctioned by Lord St. Leonards (*m*), may be theoretically correct but its practical inconvenience, as much to purchasers as to vendors, is so great, that in practice it had previously been all but universally ignored: nor has the practice, it is believed, been materially, if at all, affected by that decision. Thus, to take a common instance, a solicitor, who is conducting a sale of his client's property, frequently makes him an advance in anticipation of the sale, and, as a security, takes an informal equitable charge upon the property, on the expected sale-proceeds, out of which, on completion of the purchase, the debt is satisfied. The existence of such an incumbrance is seldom, if ever, disclosed. Its suppression can in nowise prejudice the purchaser: its introduction upon the face of the title would be a probable source of future difficulty and expense. If the rule be really as laid down in *Drummond*.

Drummond v. Tracey.

(*l*) *Drummond v. Tracey*, Johns. (m) Sug. 411.

Drummond v. Tracey, the conclusion seems to be inevitable that the astuteness with which modern conveyancers have striven to avoid the unnecessary disclosure upon a title of mere equities, has been altogether a mistake;—although their practice, in this respect, has been sanctioned by the example of the Court of Chancery itself, in its own conveyancing transactions;—and that every defunct equity, which, during the last sixty—or now forty—years, has affected the property, whether created by writing or merely by parol, (for there is no valid distinction between the two modes of effecting the same result) ought to be abstracted: for course it would be mere waste of time to communicate their past existence to the purchaser, and leave him to require the abstract to be amended. Upon the whole, with the greatest possible respect for the very eminent Judge who decided *Drummond v. Tracey*, it is submitted that the rule, as stated by the writer, is one which is in conformity with long established conveyancing usage and as such, and as being also based upon considerations of great practical convenience, it ought not lightly to be annulled or shaken. Of course, if the vendor or his solicitor is especially required to state whether there are any undisclosed incumbrances affecting the property, the existence of such an equitable charge, if subsisting, must be divulged. It is one of the inconveniences of such a requisition, that it may elicit information, which has been judiciously withheld.

As to liability
of vendor's
solicitor under
22 & 23 Vict.
c. 35, for sup-
pressing in-
cumbrances, &c.

If the vendor's solicitor, by fraudulently suppressing a document, damnify the purchaser, he is answerable for the loss, and by a late Statute is made criminally responsible. By the 24th section of 22 & 23 Vict. c. 35, a seller or mortgagor, or his solicitor or agent, who conceals any instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or who falsifies any pedigree, on which the title does or may depend, in order to induce such purchaser or mortgagee to, accept the title, with intent to defraud, is made guilty of misdemeanour, and also liable to an action for damages. This section, it is conceived, can only apply to the

fraudulent concealment of an *existing* incumbrance; nor will the vendor's solicitor be criminally responsible, if he suppress a mere equitable charge, which has been satisfied, or which no longer affects the title. The section plainly contemplates that there may be documents of title which are *not* material; what are, and what are not, material in each particular case may safely be left to the discretion of the solicitor, who, with the penal consequences of this Statute in view, is not likely to make an omission which will prejudice a purchaser.

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The loss of a deed of a date subsequent to the commencement of the abstract, is no objection to the title, if, under all the circumstances, the clear presumption be that the instrument, if produced, would not throw any difficulty about the title (*n*); this doctrine, however, must be applied with the greatest hesitation to cases where modern deeds are lost, and no satisfactory evidence exists of their contents (*o*).

As to loss of
modern deeds.

The abstract should notice all drainage and land improvement loans (*p*) and other subsisting charges upon the property; and should also, if the title has been commuted, state the amount and particulars of the commutation rent-charge.

All charges
should be
noticed.

Copies of wills abstracted, (if of an at all informal character,) and of private Acts of Parliament upon which the title depends, should accompany the abstract.

Should be ac-
companied by
copies of wills
and private
Acts.

It has been held at Law to be sufficient for the purpose of identification that the abstract should refer to, without containing copies of, maps or plans indorsed upon the deeds (*q*): but this can scarcely be so in cases where, as now often happens, a deed contains no substantive description of the property, but conveys it either merely, or as respects its

Plans may be
referred to:
but copies
should gene-
rally be fur-
nished.

(*n*) *Minchin v. Vance*, 2 S. Atk. 513.
Conv. 386, b. See, as to earlier docu-
ments, *Prosser v. Wade*, 6 Madd. 59;
and as to the loss of the lease under
which the property is held, *Friend v.*
Buckley, L. R. 5 Q. B. 213, n. (in
ejectment) *Doe v. Brooks*, 3 Ad. & E.

513.

(*o*) *Vide* *infra*.

(*p*) *Vide* *supra*, p. 88; *infra*, Ch.
sect. 2.

(*q*) See *Dunlop v. Smith*, 2 Exch.
792; *sed quare*.

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§ 2.

details, by reference to the plan. According to present practice, a plan is generally employed, if not to define, at any rate to elucidate the description of the parcels: a tracing of it, when not sent with the abstract, is usually furnished upon the purchaser's request; and may, it is conceived, in most cases be insisted on (r).

And by statement of evidence.

A statement of the evidence which the vendor is able to produce in support of the title may conveniently accompany the abstract; this, however, is not often attended to. When matters of importance are to be proved by statutory declaration, it is desirable, with a view to expediting business, that copies of the proposed declarations should accompany the abstract.

As to consulting counsel thereon on behalf of vendor.

Cases not unfrequently occur of complicated titles, in which the solicitor who prepares the abstract will be justified in laying it before counsel on behalf of his own client; this remark applies particularly to heavy mortgage transactions, in which considerable expense to the mortgagor may frequently be saved by the delivery in the first instance of a perfect and well-verified abstract.

Table of contents.

It not unfrequently occurs that a heavy abstract is prefaced by a concise analytical table of contents. The practice is a most commendable one.

How to be copied.

An abstract may be written so illegibly, or upon paper of such an inconvenient size or substance, as to justify the purchaser's solicitor or counsel in declining to receive it (s).

Effect of non-delivery of abstract, on

The non-delivery of a perfect or sufficient (t) abstract on the day named, discharges the purchaser from any conditions

(r) As to the importance of a plan in ascertaining the parcels, see *Lyle v. Richards*, L. R. 1 E. & Ir. Ap. 222; and *vide infra*, Ch. XVII. s. 4.

(s) See Sug. 406. Abstracts, it appears, ought in strictness to con-

tain ten, but are usually passed on taxation if containing on an average eight folios per sheet. *In re Walsh* 12 Beav. 490.

(t) *Vide supra*, p. 281; as to what is a perfect or sufficient abstract.

binding him to make objections, &c., within a specified time after delivery (u); and, at Law, relieves him altogether from the contract (x): in Equity, however, the purchaser will be bound if either he neglect to apply for the abstract within a reasonable time before the day fixed for its delivery (y); or if, upon its being subsequently tendered, he receive it without objection (z): but the wilful (a) neglect on the part of a vendor to prepare the abstract within proper time, when pressed by the purchaser to do so, will, even in Equity, entitle the purchaser to avoid the contract so soon as the time fixed for completion has elapsed (b): where the purchaser's solicitor intends to rely upon the non-delivery of the abstract upon the day named, or (if no day have been named) within a reasonable time before the day fixed for completion, as a ground for refusing to complete the purchase, he should decline to receive it; or, if forwarded to him under circumstances which gave no opportunity for its rejection, he should at once return it, and without reading it (c).

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purchaser's
liability under
the contract.

Non-delivery,
how to be
taken ad-
vantage of.

Where it is important to the purchaser to complete, (if at all), at or about the time fixed for completion, and the abstract, having been called for, is delivered so late as to render it doubtful whether this can be accomplished, the most expedient course would appear to be, to return it unread; offering, however, to receive it again, without prejudice to the purchaser's right to annul the contract, if, on investigating the title, it should be found impossible to complete at (or within some short specified period after) the time originally fixed for completion.

Suggested
course of pro-
ceeding by
purchaser.

Upon a sale of an estate with a title registered under the

Abstract of
title to estate

(a) *Southby v. Hunt*, 2 Myl. & C. 211; and see *Roberts v. Berry*, 3 De G. M. & G. 261; and see *Sherwin v. Shakespeare*, 5 De G. M. & G. 517; *Upperton v. Nickolson*, L. R. 6 Ch. Ap. 486.

(z) Sug. 260; *Berry v. Young*, 2 Esp. 640, n.

(y) *Guest v. Homfray*, 5 Ves. 818,

823; *Jones v. Price*, 3 Anst. 924.

(2) Sug. 261; *Smith v. Burnam*, 2 Anst. 527.

(a) See *Roberts v. Berry*, 3 De G. M. & G. 284; *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61.

(b) Sug. 261; *Seton v. Stade*, 7 Ves. 265.

(c) See 7 Ves. 278.

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with regis-
tered title.

Land Registry Act, 25 & 26 Vict., the abstract should consist of copies of such entries upon the register as are necessary in order to show the subsisting state of the title, as appearing, for the time being, upon the register, and irrespectively of the antecedent history of the title. Sometimes, however, the entries relating to the subsisting title refer to the antecedent entries in such a manner as to incorporate them with the later entries; and in such a case, of course, such antecedent entries must themselves also be abstracted.

Section 5.

As to the ex-
amination and
perusal of the
abstract.

Whether to be
compared
with deeds
before investi-
gation of title.

(5.) *As to the examination and perusal of the abstract.*

The purchaser's solicitor may, if he please, compare the abstract with the deeds before investigating the title, and the vendor (assuming that there is a binding contract) must pay the costs if the title prove bad (*d*); but unless the abstract be apparently defective, it is better to defer doing so until counsel's opinion (if taken) is obtained upon it (*e*).

As to con-
sulting counsel
thereon on
behalf of pur-
chaser.

A purchaser's solicitor, it is conceived, is *prima facie* legally justified in incurring the expense of counsel's opinion upon the abstract. In London, perhaps, the majority of titles (except those of the simplest description) are submitted to counsel: in the country, the practice inclines considerably the other way: it appears, however, that a solicitor ought himself to peruse an abstract before submitting it to counsel; and that he will be allowed a fee for such perusal, and also the stationer's charge for making a copy of the abstract (*f*). Titles it is believed are constantly accepted, almost without investigation, merely upon the faith of their having, on some previous occasion, been advised upon and accepted by counsel of eminence. It should, however, be remembered that the decisions of the various Courts of Law and Equity have a retrospective effect upon titles; so that, in estimating the value of a favourable opinion taken a few years pre-

(*d*) *Hodges v. Earl of Litchfield*, 1
Bing. N. C. 499.

(*e*) *Sug. 411.*

(*f*) *Drax v. Scroupe*, 1 Dowl. P. C.
69.

vously, allowance must be made for the possibility of the title having been since rendered unmarketable, possibly unsafe, by some intermediate and unexpected exposition of the law (g). It is also important to know whether the counsel who accepted the title did so upon an open contract, or under the restrictive influence of special conditions; and whether any special reasons may have existed, which would probably render him astute in endeavouring to take a favourable view of the title. It may also be of some importance to know whether the investigation was on behalf of a purchaser or a mortgagee. For in some respects the requirements of counsel are, or ought to be, more, and in others they may properly be less, strict when advising on behalf of a mortgagee than when advising on behalf of a purchaser. For a mortgagee who looks merely to a return of his money and cares nothing for the estate or any part of it except so far as it is a security for his money, on the one hand requires an absolutely safe title to a sufficient amount of property to leave him perfectly secure in all events; and if satisfied as to this, he may be comparatively indifferent to defects in title to that which he can afford to regard as a mere margin to his security. He might, therefore, on the one hand, in the case of a residential property, be indifferent as to a probable want of title to some particular part of it, the loss of which would be all-important to a purchaser, as destructive to the place as a residence, yet would leave an amount of unsightly but productive acreage amply sufficient to cover the amount of the mortgage debt. While on the other hand, a mere shade of doubt respecting the soundness of the general title, which might very possibly be disregarded by a purchaser eager to acquire an attractive property, would be a sufficient reason for a mortgagee at once declining to advance his money. Land adjoining, or in the immediate vicinity of, residential property, and which if in other hands might be so used as to depreciate the principal estate, will

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As to the
value of old
opinions in
favour of a
title.

(g) The decision in *Honeywood v. Forster*, 30 Beav. 1, and followed by that in *Gibbons v. Snape*, 1 De G. J. & S. 621, establishing the necessity for

entering a disentailing deed of copyholds upon the Court Rolls within six calendar months after execution, may be cited in illustration.

THE ABSTRACT.

Copy. often be purchased by the owner of such estate in disregard of great uncertainty respecting, or even of positive and serious objections to, the title. The above remarks apply particularly to questions as to evidence of identity of parcels, and as to boundaries, and easements. As respects mere pecuniary charges it is obvious that when an estate is of very ample value, a question as to the possible existence of charges of limited amount, and which would be of serious importance to a purchaser, may be altogether disregarded by a mortgagee, who is about to advance his money upon that which even *minus* the charge is a perfectly satisfactory security.

Copy of agreement should accompany abstract.

The abstract when submitted to counsel, should, of course, be accompanied by a copy of the agreement and conditions of sale (if any).

As to perusing abstracts.

It is suggested that the most convenient plan of perusing abstracts (especially for those whose experience is limited) is as follows; *viz*, immediately upon perusing, and thoroughly understanding, an abstracted document, to enter it, by its date and parties, in the abstract book, or, which is more convenient, on paper so arranged as to be readily collected and bound when desired; with as concise a statement as possible of the effect of each abstracted document, and a memorandum of any peculiarity which may appear in its contents, or of any deficiency in the usual statements as to execution, registration, indorsement of receipts, &c.; and then in the margin of the abstract book or paper to make all those queries and requisitions which would properly be made if the instrument in question were the termination of the title, except such as the early date of the instrument or other circumstances may render evidently unnecessary: for instance, an estate tail has been created,—the query will be, "how has this been barred?" a man acquires within a recent period an estate in fee,—the query will be, "is any widow dowable?" the estate is charged with an annuity,—the query will be, "is this a subsisting charge?" a death or descent is stated,—the marginal note will be, "productive of usual evidence?" a deed is not regis-

tered,—the marginal note will be, “must be registered at the vendor’s expense:” in all probability, on advancing further in the abstract, most of the queries will be satisfactorily answered, and many of the requisitions will be found to be unnecessary; and, whenever this is the case, the pen may be passed lightly through the marginal note, not so as to render it illegible, but merely to show that it is unimportant, and the number of the subsequent page which supplies the information may be added by way of reference. By adopting this course, or some modification of it, an interruption in the perusal of the abstract is rendered comparatively unimportant; a very short reference to the analysis is sufficient to show how matters stood at the time of the interruption; and when the perusal is finished, such of the marginal notes as have not been crossed out will furnish safe materials for the opinion.

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The acceptance of a title is no waiver of objections which are not disclosed by the abstract (*h*); nor is a client bound by his counsel’s acceptance of a defective title, even although the defect appear upon the abstract (*i*): if, however, counsel waive a requisition, and the purchaser adopt his opinion and deal with the vendor on that view, he cannot afterwards repudiate it (*k*).

Acceptance of
title shown by
—to what it
extends.

If a solicitor be concerned for both parties, although of course bound to see that the purchaser does not buy with a defective title, or buy that which is in fact his own, he is not at liberty to disclose defects in the vendor’s title of which the purchaser might himself take advantage: and a solicitor acting in contravention of the rule has been held liable in an action for damages (*l*).

Defects in
client’s title
must not be
disclosed to
client entitled
to take ad-
vantage
thereof.

(*h*) *Const. v. Barr*, 2 Mer. 57; *Att. Gen. v. Simell*, 1 Y. & C. 570; *Ward v. Traill*, 14 Sim. 82; 8 Jur. 303; *McCulloch v. Gregory*, 1 K. & J. 286; and see *Bown v. Stenson*, 24 Beav. 631; *Turquand v. Rhodes*, 37 L. J. Ch. 830, where the purchaser had taken possession, and yet was allowed to rescind on the ground of serious

misdescription discovered *aliunde*.

(*i*) See *Deverell v. Lord Bolton*, 18 Ves. 505; *Stewart v. Allison*, 1 Mer. 33; *McCulloch v. Gregory*, 1 K. & J. 292.

(*k*) *Alexander v. Crosby*, 1 J. & L. 666.

(*l*) *Taylor v. Blackton*, 3 Bing. N.C. 235.

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Sect. 8.

As to the
verification of
the abstract.

Verification of
abstract—
what evidence
may be re-
quired in
proof of docu-
ments and
facts.

(6). *As to the verification of the abstract.*

Assuming that an apparently good title is deduced by the abstract, the next matter for consideration is, the evidence which a purchaser may require in support of it; and this subject naturally divides itself into two heads; viz, first, what evidence may be required of the existence and genuineness of abstracted documents; and, secondly, what evidence may be required of other matters of fact.

As to proof
of private
Acts.

A private Act of Parliament directed to be noticed as a public one, is sufficiently proved by the printed copy, if printed by the Queen's printer (*m*); and it is by an Act of the present reign rendered unnecessary to prove that the copy purporting to be, was in fact, so printed (*n*); nor was such proof previously necessary as respects Acts which contained the usual clause making printed copies evidence: in default of such evidence, an Act should be proved by a copy examined with the original (*o*).

Of awards
under In-
closure Acts.

An award under an Inclosure Act is proved by a copy, or extract, signed by the proper officer of the Court, if the enrolment have been made in one of the Courts at Westminster; or by the Clerk of the Peace for the county, or his deputy, if the enrolment have been made with the Clerk of the Peace (*p*).

Of copyhold
assurances.

Copyhold assurances are proved by the copies of Court Roll signed by the steward; and it appears that, in strictness, evidence may be required of the steward's handwriting (*q*), except, perhaps, where he is dead (*r*), and the document is

(*m*) *Beaumont v. Mountain*, 10 Bing. 404.

(*n*) 8 & 9 Vict. c. 113, s. 3.

(*o*) 1 Jarm. Conv. by S. 169; as to proof of old private Act, which has been omitted from the Parliament Roll, see *Doe v. Brydges*, 7 Sc. N. R.

333.

(*p*) See 41 Geo. III. c. 109, s. 35; 3 & 4 Will. IV. c. 87, s. 2.

(*q*) Scriv. on Cop. 5th Ed. p. 351.

(*r*) And Smith may, for this purpose, be presumed after 30 years, *Doe v. Michael*, 15 Jur. 679, Q. B.

above thirty years old and comes from the proper custody (s): such a requisition, however, when even modern copies come from the proper custody, is not usual, in practice, unless there are special grounds for suspicion. Copies authenticated by the steward are evidence, although they are not the copies originally delivered to the tenant (t); and so also are mere examined copies (u). The purchaser may, it is conceived, in the absence of special agreement, generally compel the vendor (at his own expense) to verify his abstract by the production of authenticated or examined copies, in cases where the originals are lost, even although the steward will allow the purchaser to inspect the Court Rolls; probably, however, the rule might be different when, as may often happen, the vendor's solicitor, by being himself the steward, or otherwise, is enabled to produce the original Rolls at the proper place for verification of the abstract, and can satisfactorily account for the absence of the original copies, so as to avoid any difficulty which may be raised by the doctrine of *Whitbread v. Jordan* (v). If the vendor be thus obliged to procure fresh copies for the purpose of verification, they will (unless he sell to another person an estate of greater value held under the same title, or himself retain property held under the same title) belong to the purchaser (x). If a surrender have been by attorney, the power of attorney must be produced, and evidence must be given of the principal having been alive at the time of its being acted on (y): and where the power was not given for valuable consideration (z), inquiry should be made whether it was revoked prior to its apparent exercise: the statement of a power of attorney on the Court Rolls is secondary evidence of the original, if the latter cannot be found (u).

(s) Scriv. on Cop. 5th Edn. 351;
Wynne v. Tyrokhitt, 1 B. & Ald. 376.

(t) *Breeze v. Hawker*, 14 Sim. 350;
and see now 14 & 15 Vict. c. 92, s. 14.

(u) See *Doc v. Freeman*, 12 M. & W. 844; and examined copies, not signed by the steward, do not require stamps: *S. C.*

(v) 1 Y. & C. 303.

(x) Sug. 476.

(y) See cases cited 5 C. B. 917, n.;
Sug. 417.

(z) Which would render it irrevocable, see *Abbott v. Stratten*, 3 J. & L. 603, 613; *Smart v. Sanders*, 5 C. B. 917.

(a) *Doc d. Counsell v. Caperton*, 9 Carr. & P. 112.

Case VIII. Deeds abstracted must be proved by the production of the originals, if not lost or destroyed (b); the attesting witness, or one of the attesting witnesses, (if alive,) may, perhaps, in strictness be required at Law to prove the due execution (c); unless the deed be thirty years old and comes from the proper custody (d); but this, where a modern deed comes from such custody (e), is never urged in practice except upon special grounds (f); and such a requisition, unless made upon special and sufficient grounds, would probably be discountenanced by a Court of Equity. And now by the Common Law Procedure Act, 1854 (g), it is not necessary to prove by the attesting witness, any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto. When a deed has been executed by attorney, the same requisitions and inquiry should be made as in the case of a surrender by attorney (h). Where the loss or destruction of a deed can be proved (i), secondary evidence may be given of its contents; but proof must also be given of its due execution and delivery (k): an attested copy, however, taken and kept for 110 years in a public office, of a deed which could not be found, was admitted by Lord Hardwicke as sufficient evidence of the original; and he intimated that, under the special circumstances, a plain copy would have been ad-

(b) *Supra*, p. 142. As to mutilation of deeds, and defects in the stamps, &c., *vide infra*.

(c) *Laythorp v. Bryant*, 1 Bing. N. C. 421.

(d) 2 Phill. on Ev. 203; *Man v. Ricketts*, 7 Beav. 93; *Doe v. Michael*, 15 Jur. 679, Q. B.

(e) I.e., a place where it may reasonably be expected to be found, although not the most proper place of custody; *Croughton v. Blake*, 12 M. & W. 205; *Doe v. Phillips*, 8 Q. B. 155.

(f) 1 Jarm. Conv. by S. 179. Lord St. Leonards seems to think that it is

sufficient, in the absence of special circumstances, on the sale of freeholds, to prove the due execution of the conveyance of the fee to the vendor: V. & P. 439; see *Thomas v. Miles*, 1 Esp. 184; *Nash v. Turner*, *ibid.* 217; but see also *Crosby v. Percy*, 1 Camp. 303.

(g) 17 & 18 Vict. c. 125, s. 26.

(h) *Supra*.

(i) As to what evidence of loss is sufficient, *vide supra*, p. 142, n. (c).

(k) *Bryant v. Bank*, 4 Bess. 1; *Soultby v. Hunt*, 4 Myl. & C. 207; and see *Doe v. Bridges*, 7 Sc. N. R. 398.

missible (l): so, in a modern Peerage case, the House of Lords admitted as evidence an attested copy of a settlement dated in 1098, produced from the proper custody, and according to which possession of the estates had gone for many years (m). Examined copies of the enrolment of deeds required by Law to be enrolled, are, it appears, sufficient evidence of the originals; but, where the enrolment is not compulsory, a copy is evidence only as against the parties on whose acknowledgment enrolment was made, and their representatives (n): and the non-production of the original should be accounted for. The recital of a deed is evidence of its existence as against all parties executing the deed containing the recital, and those claiming under them, but is no evidence of its contents or effect beyond what its name and nature necessarily imply, unless proof be given of its loss or destruction (o): an examined copy of the memorial of a deed registered in a Register County is secondary evidence of the deed as against the parties thereto, and all persons claiming under them (p); but probably not as against strangers (q).

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Recitals of—
when evi-
dence.

The enrolment or an examined copy of the enrolment of any deed, executed under the provisions of the Acts relating to the Duchy of Cornwall, is sufficient proof of the contents and due execution of the original; although its non-production be not accounted for (r): so, too, the office copy of an enrolled bargain and sale is sufficient (s).

In a case in Ireland, by a settlement executed in 1745, estates were limited in strict settlement, with a power of revocation reserved to the settlor; this power was stated

(l) *Harvey v. Phillips*, 2 Atk. 541.

(m) *Fitzwalter Peerage*, 10 Cl. & F. 952.

(n) 1 Jarm. Conv. by S. 170.

(o) *Burt Comp.* pl. 478 et seq.; see *Gillett v. Abbott*, 7 Ad. & E. 789; *Bringles v. Goodson*, 5 Bing. N. C. 738.

(p) *Wollaston v. Hawksell*, 3 Mann. & Gr. 207; *Doe v. Oxford*, 2 Ck. &

P. 448; see *Hobhouse v. Hamilton*, 1 Sch. & L. 207.

(q) *Doe v. Clifford*, *ubi supra*: *Allen v. Allen*, 1 Con. & L. 427, 457; but see *Collins v. Maule*, 8 Car. & P. 502. As to memorials of assignments of Irish judgments, see *Fitzgerald v. Fitzgerald*, 8 O. B. 592.

(r) 7 & 8 Vict. c. 65, s. 34.

(s) 10 Anne, c. 18, s. 3.

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to have been exercised by a will dated in 1761, but of which neither the original nor any copy could be produced; the estates were re-settled in 1763 by a deed which recited the power of revocation and exercise of the power by the will, and possession had ever since gone under this deed; under these circumstances, Lord St. Leonards held the recital to be sufficient evidence of the contents and execution of the will (t).

The same estates were limited in strict settlement in 1788; in February, 1814, the tenant for life and first tenant in tail entered into articles of agreement to bar the entail and re-settle the estates to certain specified uses, with a power of revocation: neither the original nor any copy of the articles could be produced, although search had been made for them; they were, however, recited in the deed making the tenant to the praecipe, which was dated March, 1814: in 1815, upon the marriage of the tenant in tail, the power of revocation was exercised, and the estates were re-settled, and had since been enjoyed accordingly: Lord St. Leonards, after remarking that the articles appeared to have been voluntary, and that the settlement was for consideration, held, that, under the special circumstances of the case, the recital was sufficient evidence of the contents of the articles (u).

Possibly, in the above case, the decision might have been different, if, instead of mere articles of agreement, the missing instrument had been one which affected the legal estate.

Lease for a
year proved
by recital.

Renewed
ecclesiastical
lease.

The recital or mention of a lease for a year in any conveyance executed before the 15th May, 1841, is sufficient evidence of the execution of such lease; without proof of its loss (x): and in any renewed ecclesiastical lease granted since the 21st June, 1836, (unless in pursuance of a covenant or agreement

(t) *Alexander v. Crosby*, 1 J. & L. 666; see *Prosser v. Watts*, 6 Madd. 59.

(u) *Alexander v. Crosby*, 1 J. & L.

666.

(x) 4 & 5 Vict. c. 21, s. 2. See as to Ireland, 9 Geo. 2, c. 5; 1 Geo. 3, c. 3.

entered into before the 1st of March, 1836,) the recital of the old lease, and of the deaths, &c. of the *cestuis que vie*, is conclusive evidence thereof (*y*).

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Where the title depends upon a deed acknowledged by a married woman, under the 3 & 4 Will IV. c. 74, evidence should be given of the certificate of acknowledgment having been duly filed (*z*).

Acknowledged
deed.

A fine should be proved by the chirograph, or an exemplification under the seal (*a*) of the Court, or a copy examined with the original roll, and proved by the oath of the examiner (*b*): mere office extracts, although often relied on, and generally received by conveyancers, are not evidence (*c*).

Fines.

A recovery is proved by an exemplification or an examined copy (*d*).

Recoveries.

A sealed certificate by the proper officer of the enrolment of a disentailing assurance, or any other deed or document enrolled in Chancery, is sufficient *prima facie* evidence that the same was duly enrolled at the time mentioned in the certificate; and copies of all enrolments, if stamped with the seal of the Chancery Enrolment Office, are evidence to the same extent and in the same manner as the original enrolments (*e*).

Proof under
statutes.

So, certified copies of, or extracts from, deeds, documents, maps, &c., deposited in the Office of Land Revenue, Records, and Enrolments, are admissible in every case in which the original would have been admitted as evidence (*f*).

Certified
copies.

(*y*) 6 Will. IV. c. 20, ss. 2 & 9.

(*z*) *Jolly v. Hancock*, 7 Exch. 820.

As to the mode and practice of taking acknowledgment, *vide infra*, Ch. XIII. s. 1.

(*a*) The loss of the seal is immaterial, if the document come from the proper custody; *Mayor of Beverley v.*

Craven, 2 Moo. & R. 140.

(*b*) Burt. Comp. pl. 487; *Doe v. Ross*, 7 M. & W. 102.

(*c*) Buller's N. P. 227.

(*d*) Burt. Comp. pl. 490.

(*e*) 12 & 13 Vict. c. 109, ss. 18, 19.

(*f*) 15 & 16 Vict. c. 62, s. 8.

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Where an estate has been purchased and held for twenty years or upwards under a title which depends upon a recovery which has not been enrolled, the deed duly making the tenant to the præcipe, and leading the uses of the recovery, is sufficient evidence thereof, as in favour of the purchaser, and all parties claiming under him (*g*).

**Under Fines
and Recoveries
Act.**

The 3 & 4 Will. IV. c. 74, s. 13, provides for the change of custody of the Records of Fines and Recoveries levied and suffered at Westminster, Lancaster, and Durham; and makes extracts and copies, supplied after such change of custody, as available in evidence as they would have been if supplied in the usual way before the passing of the Act; and by the 5 Vict. c. 32, provision is made for the enrolment, in the office of the Registrar of the Court of Common Pleas at Westminster, of the proceedings in Fines and Recoveries levied and suffered in the Courts of Great Session in Wales, and the Court of Great Session in Cheshire, and for remedying in certain cases defects in the original Records (*h*), and for supplying evidence of the fines having been levied with proclamations; and as regards proclamations, the 11 & 12 Vict. c. 70, contains a similar provision as to fines at Westminster.

**Proof of grant
from Crown.**

A grant from the Crown is regularly proved by an exemplification, or certified copy, but if the original be lost, and the vendor's solicitor ascertain and inform the purchaser where the grant is enrolled, the latter cannot, it appears, require a copy, but must examine the enrolment at his own expense (*i*).

**Of proceed-
ings at Law
and in
Equity.**

Proceedings in the Courts of Law and Equity are regularly proved by exemplifications under the seals of the Courts, or authenticated by the signature of the Judge (in cases where the Court has no seal) (*k*); and proof of the

(*g*) 14 Geo. II. c. 20, s. 4.

(*h*) See *Doe v. Price*, 16 M. & W. 808.

(*i*) Stat. 431.

(*k*) *Allen v. Baggery*, 4 Camp. 28.

As to foreign and colonial proceedings, see 14 & 15 Vict. c. 90, s. 7; as to Irish documents, see sect. 10.

seal or signature is rendered unnecessary by the 8 & 9 Vict. c. 113 (l).

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Proceedings in Bankruptcy and Insolvency are proved by copies certified in manner directed by the several Acts (m); proof of the seals and signatures is rendered unnecessary by the 8 & 9 Vict. c. 113, and also by the Bankruptcy Acts of 1849, 1861, and 1869 (n).

And in
Bankruptcy
and Insol-
vency.

The fiat, (or, if the case be under the Acts of 1849 or 1861 (o), the petition), adjudication, and certificate of appointment of assignees, if not enrolled, ought to have been entered on record by the vendor, and at his expense; Mr. Jarman considered that this was necessary, although the bankrupt was willing to join in the conveyance (p); Lord St. Leonards held the contrary, and also, that such a requisition could not be insisted on if it were too late to upset the bankruptcy (q); and this seems to be the sounder opinion.

As to the
enrolment of
proceedings
in Bank-
ruptcy.

A certificate by the Court as to the appointment of a trustee, and as to any change in the trusteeship, is by the recent Act made conclusive evidence that the person named in such certificate is trustee (r). And a minute signed by the registrar, or other person presiding at a meeting of creditors under the Act, of the resolutions and proceedings

Proceedings
in Bank-
ruptcy under
the late Act.

(l) See last note.

(m) See, as to Insolvency, 53 Geo. III. c. 102, s. 24; 7 Geo. IV. c. 57, s. 76 (see *Doe v. Evans*, 1 Cro. & M. 450; *Doe v. Story*, 7 Ad. & E. 909); 1 & 2 Vict. c. 110, s. 105; 5 & 6 Vict. c. 118, s. 11; 7 & 8 Vict. c. 96, s. 37; 24 & 25 Vict. c. 134, s. 206: and as to Bankruptcy, 6 Geo. IV. c. 16, s. 97; 1 & 2 Will. IV. c. 56, s. 29; 12 & 13 Vict. c. 106, ss. 232, et seq.; 24 & 25 Vict. c. 134, ss. 203, et seq.; and see now 32 & 33 Vict. c. 71, ss. 107, 108.

(n) See 12 & 13 Vict. c. 106, s. 236, not repealed by the later Act; and see 24 & 25 Vict. c. 134, ss. 203, 204, 206, 207; 32 & 33 Vict. c. 71, s. 109; and see General Rules 105 & 106; and as to the appointment of the trustee being gazetted, see note 111.

(o) 12 & 13 Vict. c. 106; 24 & 25 Vict. c. 134.

(p) 1 Jarm. Conv. by s. 97.

(q) Sug. 542; see 12 & 13 Vict. c. 106, s. 236; 24 & 25 Vict. c. 134, s. 203.

(r) 32 & 33 Vict. c. 71, s. 18.

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at such meeting, is to be received as evidence in all legal proceedings (s). And any petition, or copy of a petition, in Bankruptcy, or any order or copy of an order, or any certificate or copy of a certificate, made in Bankruptcy, or any deed or copy of a deed of arrangement in Bankruptcy, or any other instrument or copy of an instrument, affidavit, or document made or used in the course of any Bankruptcy proceedings, or other proceedings had under the Act, may, if any such instrument or copy appears to be sealed with the seal of any Court having jurisdiction, or purports to be signed by any judge having jurisdiction in Bankruptcy under the Act, be receivable in evidence in all legal proceedings whatever (t); and provision is made for the admission of sealed copies of the depositions of a deceased witness (u).

**As to awards
under the
Copyhold En-
franchisement
Act.**

Copies of, and extracts from, every registered award under the Copyhold Enfranchisement Act, 1852 (x), purporting to be sealed or stamped with the seal of the commissioners, is evidence, without the necessity of further proof.

**Orders in
Lunacy.**

So, office copies of orders in Lunacy, purporting to be signed by the Registrar in Lunacy, and sealed or stamped with the seal of his office, are evidence, for all purposes, of such orders (y).

**Proof of by
office copies.**

Office copies, (i. e., copies made by an officer of a Court under its authority,) although not strictly evidence (z), except in the causes or matters to which they belong, are received as evidence by conveyancers.

**As to certified
copies of
records under
1 & 2 Vict.
c. 94.**

And we may here remark, that by the 1 and 2 Vict. c. 94, the Records of the Courts of Chancery, Exchequer, Queen's Bench, and Common Pleas, and of the abolished Courts in

(s) Sect. 106.

(t) Sect. 107.

(u) Sect. 108.

(v) 15 & 16 Vict. c. 58, s. 49; and

see 16 & 17 Vict. c. 57, s. 8.

(y) 15 & 16 Vict. c. 57, s. 20.

(z) But see now 14 & 15 Vict. c.

92, s. 14, *infra*.

Wales, Chester, Durham, and Isle of Ely, are committed to the custody of the Master of the Rolls; and by sections 12 & 13, certified copies of such Records under the seal of the Record Office, are made evidence equally with the originals.

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British Diplomatic and Consular agents abroad are empowered to do notarial acts; and any document, impressed or subscribed with the seal or signature of any such agent, in testimony of such notarial act having been done by or before him, is sufficient evidence, without proof of the seal or signature (a).

As to notarial
acts by Con-
sular Agents.

And by the Act amending the law of evidence (b) it is enacted that "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no Statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted;" and such copies or extracts are to be furnished on request, at a charge not exceeding fourpence per folio of ninety words.

As to ex-
amined or cer-
tified copies
under 14 & 15
Vict. c. 99.

Extracts from parochial registers, purporting to be signed and certified by the *curate*, have been admitted in evidence, without verification of his signature, or proof of his being the proper custodian of the registers (c).

As to paro-
chial registers.

The probate, or (if that be lost) an official copy, is usually received by conveyancers as sufficient evidence of a will,

Proof of will.

(a) 18 & 19 Vict. c. 42; and see also as to notarial acts, 15 & 16 Vict. c. 86, s. 22; Morgan's Ch. Acts, p. 180, and cases there cited; Taylor, 366.

(b) 14 & 15 Vict. c. 99, s. 14.

(c) *Re Neldy Hall's Estate*, 17 Jur. 29; incorrectly reported in 2 De G. M. & G. 748; See *Re Porter's Trust*, 2 Jur. N. S. 349.

Copy Will. whether relating to real or personal estate (*d*); although the probate has been held to be in strictness inadmissible even as secondary evidence, in a question of title to freehold (*d*) or copyhold (*e*) property: however, in some modern Peerage cases, the copy of a will produced from the Prerogative Office was received in evidence, upon the absence of the original from the office being accounted for (*f*); and it has been held that, under special circumstances, a purchaser of merely real estate might require a testamentary instrument to be proved in the Ecclesiastical Court (*g*). Now, under the recent Act to amend the Law relating to Probates and Letters of Administration in England (*h*), where a will affecting real estate is proved in solemn form, or where its validity is disputed, the heir and persons interested in the real estate are to be cited to appear (*i*); and where the will is proved in solemn form, or its validity otherwise decided on by the decree or order of the Court, the probate or a stamped copy of the will is made conclusive evidence of the contents and validity of the will; except in proceedings by way of appeal under the Act (*k*); and except in cases where the validity of the will is put in issue, the probate or an office copy is made evidence of the will and of its validity and contents; although it may not have been proved in solemn form, or declared valid in a contentious cause or matter (*l*).

Under recent
Probate Act.

Proof of ap-
pointment of
executors.

The Probate Act Book of the Ecclesiastical Court is evidence of the appointment of executors (*m*); and an official extract from such book has been usually received in

(*d*) 4 Jarm. Conv. by S. 178; *Kerlin v. Kerlin*, 18 Jur. 813.

(*e*) Scriv. on Copyhold, 5th edn. p. 363; *Jerroise v. Duke of Northumberland*, 1 Jac. & W. 570; but see *Archer v. Slater*, 10 Sim. 624; 11 Sim. 507. And see, as to the proof of a will, the original of which is abroad or has been lost, *Pullen v. Rawlins*, 4 Beav. 142, and notes of cases subjoined; and *Ross v. Macmahon*, 12 Sim. 553.

(*f*) *Pittwater Peerage*, 10 Cl. & F. 500; *Braye Peerage*, 4 Cl. & F. 767;

see, however, the *Nottorville Peerage*, 2 Dow. & Cl. 242, where Lord Eldon held that proof must be given of the actual loss or destruction of the original.

(*g*) *Waddall v. Mann*, 17 Beav. 160.

(*h*) 20 & 21 Vict. c. 77.

(*i*) Sect. 61, and see sect. 63.

(*k*) Sect. 62.

(*l*) Sect. 64.

(*m*) *Cox v. Birmingham*, Jac. 314.

practice, where (as in the case of tracing a title to a chattel real held in trust) there is little chance of the will containing a specific bequest of the term which may have been assented to by the executor (n); and such an extract is made evidence by the 14 & 15 Vict. c. 99, s. 14 (o): where, however, a title has to be shown to a beneficial chattel interest, the risk of there having been such a bequest and consent renders it necessary to examine the entire will; and it is conceived that the purchaser may, in either case, require production of the probate or an office copy. A will thirty years old, produced from the proper custody, proves itself; and it has been held that the thirty years are to be computed from the date of the will and not from the time of the death (p).

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In examining the title to a chattel interest, care should be taken to see that probate has been granted by a Court having jurisdiction. Where an executor took out prerogative probate, and died leaving an executor who proved in a Diocesan Court, the title of the second executor, as a representative of the original testator, was held too doubtful to be forced upon a purchaser (q). Under the present law this question cannot now arise, for the Court of Probate has the same powers as formerly belonged to the Prerogative Court of the Archbishop of Canterbury (r).

In deducing title to chattel interests probate must be seen to have been granted by proper Court.

Upon a sale by a devisee of a freehold estate, the purchaser cannot (s), except under special circumstances (t), require the will to be proved in Equity against the heir-at-law.

Will need not be proved in Equity.

It may sometimes happen that a purchaser can require the production of an instrument, although it forms no part of

Documents not part of the title must

(n) The clause disposing of trust estates is generally so worded as to exclude chattels real; besides which the devises in trust are usually the executors.

(o) *Dorrel v. Mow*, 15 C. B. 142.

(p) *Man v. Richetta*, 7 Beav. 93;

see *Doe v. Michael*, 15 Jur. 679, Q. B.

(q) *Williams v. Eland*, 2 Coll. 575.

(r) See 20 & 21 Vict. c. 77, s. 23.

(s) See *Colton v. Wilson*, 3 P. Wms. 190; *Wakeman v. Duchess of Rutland*, 3 Ves. 234; *Mackrell v. Hunt*, 2 Madd. 37; *Bellamy v. Liversedge*, Sug. 439; *Smith v. Hibbard*, 2 Dick. 730; *infra*, Ch. XVIII. s. 4.

(t) *Gross v. Bastard*, 2 Ph. 619; *McCulloch v. Gregory*, 3 K. & J. 12.

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sometimes be
produced as
negative
evidence.

the title, and although he cannot claim an attested copy on completion: e.g., where property is vested in trustees, in trust to sell, with power to give receipts, and the trusts of the purchase-money are declared by a settlement referred to in the conveyance, it is generally considered that a purchaser can require the production of the settlement for the purpose of seeing that it contains nothing inconsistent with the power to give receipts, nor any other matter affecting the title, but that he is not entitled to any attested copy or covenant for production; and the fact of his not being entitled to such covenant or copy, negatives, it is conceived, the right of any subsequent purchaser to require the production of the settlement, unless it happen to be in the possession or power of the immediate vendor (u). It must, however, be noticed, that in a case of *Cooper v. Emery* (x), upon a sale by a party claiming under the heir-at-law of a deceased owner who left a will, Sir L. Shadwell, V.-C., is reported to have held that the purchaser was entitled to inspect the will, but could not insist upon a covenant for its production; thus, apparently, deciding that he was bound to accept a title without the ordinary means of proving its validity on a resale.

Deficiencies in
proof of docu-
ments, how
far supplied
by presump-
tion.

General rule.

In many cases, however, where the possession has been consistent with the *prima facie* title, presumption may supply deficiencies in proof of the existence, or due execution, of material instruments (y): the principle in the case of deeds (and which, in general, seems equally applicable to other instruments operating *inter vivos*), being this, viz., that where there has been long enjoyment of any right which could have had no lawful origin except by deed, there, in favour of such enjoyment, all necessary deeds may be presumed, if there be nothing to negative such presumption (z).

(u) 2 Ha. 260.

(x) Cited, 1 Hayes, Conv. 573.

(y) See *Chalmer v. Bradley*, 1 Jac. & W. 63.

(z) *Lyon v. Reel*, 13 M. & W. 285, 208; approved in *Greagh v. Blood*, 3 J. & L. 333; and see *Monk v. Huskisson*, 1 Sim. 285; *Att.-Gen. v. Fishmongers' Co.*, 5 Myl. & C., see p. 25; and early cases collected in *Read v. Brookman*, 3 T. R. 151; and see *Dolan v. Church*, 20 L. J. 183, V.-C. K. B.; and *Att.-Gen. v. Exeter Hospital*, 17 Beav. 590.

For instance, a grant from the Crown of an advowson (excepted in a former grant under general words) has been presumed as against a purchaser, after an uninterrupted possession evidenced by title deeds for 133 years and three presentations (*a*); so, a grant of foreshore has been presumed from a series of acts of ownership over it by an adjoining proprietor (*b*); so, a reconveyance of the legal estate from trustees has been presumed, the property having for 110 years been dealt with without reference to its remaining outstanding, although the enjoyment was consistent with the supposition of such being the case (*c*): so, the fact of a lease having been duly executed has been held sufficiently proved by the production of the counterpart (*d*): so, where copyholds were devised to trustees, upon trust to pay testator's debts, funeral expenses, two annuities, and a legacy, and then to convey the premises to T. W.; and T. W. was admitted in 1771, and a party claiming under him accepted an enfranchisement in 1791, the validity of which was considered to depend upon the regularity of T. W.'s admittance, a prior surrender by the trustees to the use of T. W. was presumed as between vendor and purchaser (*e*): so, payment of a mortgage debt, and a reconveyance of the legal estate, have been presumed after an interval of eighty years, the mortgage not being subsequently mentioned in the title deeds, and the mortgage deeds having for twenty-five years been in the possession of the vendor and his ancestors, during which period no claim, it was alleged, had been made for principal or interest (*f*); but the lapse of forty-six years from the death of a testator, and of thirty-nine years from the last notice of legacies charged by his will, has been held insufficient to warrant a presumption

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Presumption
of grant from
Crown.

Of reconvey-
ance of legal
estate.

Of lease by
production of
counterpart.

Of copyhold
surrender.

Of payment of
mortgage,
and of recon-
veyance.

(a) *Gibson v. Clark*, 1 Jac. & W. 159; *Att.-Gen. v. Exeter Hospital*, *ubi suprd*; and see *Re Alston*, 5 W. R. 189.

(b) *Calmady v. Rowe*, 6 Com. B. 861. The presumption does not so readily arise in the case of a Crown or public grant, as in the case of a grant from a private person.

(c) *Hillary v. Waller*, 12 Ves. 239; and see *Emery v. Grocock*, 6 Madd. 54; and *Noel v. Bewley*, 3 Sim. 103.

(d) *Houghton v. Konig*, 25 L. J. N. S. C. P. 218.

(e) *Wilson v. Allen*, 1 Jac. & W. 614.

(f) *Cooke v. Soltau*, 2 Sim. & St. 154.

Of surrender
to use of will.
Of enfran-
chisement.
Of mesne
assignment of
terms.

Presumption
of surrender.

of their payment (g) : so, where property was demise in 1586 for 2000 years, with a covenant to convey the fee, if required, by the lessees within seven years, it was presumed, from the dealings with it, that the property was freehold in 1715; and the presumption was not rebutted by its having been treated as leasehold in documents subsequent to that date (h). So, payment of purchase-money has been presumed after forty years (i) : so, where a memorandum of deposit, by way of equitable mortgage by a former owner, is found 'with the title deeds, it will be presumed that the charge has been satisfied or released (k) : so, after forty years' possession of copyholds under a will, a surrender to the use of the will was presumed in an early case (l) : so, the enfranchisement of a copyhold has, after an enjoyment of 160 years, been presumed even against the Crown (m) : so, in general, it will be presumed that mesne assignments of attendant terms have been regularly made (n)

"The current of the later authorities shows that where a term has been assigned to attend the inheritance, a surrender ought not to be presumed, unless there has been a dealing with the estate, in which reasonable men and men of business would not have dealt with it, unless the term had been put an end to" (o); but such surrender is not to be presumed from a mere lapse of time (p); nor can it be presumed by a Court of Law, without the intervention of a jury (q). The Act of 8 & 9 Vict. c. 112, has deprived the doctrine of much of its practical importance it must, however, be remembered

(g) *Shields v. Rice*, 3 Jur. 950 and see *Warren v. Buteman*, 1 Fl. & K. 442, as to the insufficiency of the evidence of non-payment, out of the particular lands, of interest upon charges which also affect other lands; *et rule infra*.

(h) *Jeffrey v. Machu*, 29 Beav. 344; but see *Pickett v. Packham*, L. R. 4 Ch. App. 190.

(i) *Billake v. Grundel*, 1 Ch. R. 56.

(k) *Field v. Summatt*, 11 C. B.

996; but the point does not seem to have been discussed.

(l) *Lyford v. Comard*, 1 Vern. 195.

(m) *Ree v. Ireland*, 11 East, 280.

(n) *Earl v. Bontor*, 2 W. Bl. 1228; *White v. Farrant*, 11 Ves. 337, 350.

(o) *Per Curiam, Gurrard v. Puck*, 8 C. B. 242.

(p) *De v. Bingham*, 12 Q. B. 711, 719.

(q) *Cornwall v. Byles*, 15 C. B. 532.

that the Act is not of universal application (*r*); and that where it applies, a vendor must still show in whom old terms supposed to have been destroyed by the Act, were vested on the day when it came into operation; and that they were then attendant on the inheritance: so that the doctrine above referred to, of presuming the existence of mesne assignments, is still of practical moment.

So, the grant of an easement will be presumed after twenty years' enjoyment (*s*); but, to raise such presumption, it is necessary to show, not only enjoyment, but that the party to whom the grant is attributed had power to make it (*t*). Of grant of easement.

Land in Kent is presumed to be of gavelkind tenure (unless shown to be disgravelled): but the presumption may be rebutted, by showing, from Domesday Book, that it was then held in frankalmoign: or, in the case of a manor, (including its demesnes, but excluding the tenemental freeholds (*u*),) that it was held in ancient demesne; or that it was held by barony (*x*), or by great or little serjeanty (*y*), or by knight-service (*z*). The appendix to a valuable work (*a*) upon the Kentish tenures, gives a list of nearly 600 manors in the county, which were held by knight-service: and which, as also the lands formerly held of them, including the enfranchised copyholds, descend according to the common law; although most of them have been long considered to be of gavelkind tenure. Of land held in gavelkind.

(*r*) *Vide supra*, p. 289.

(*s*) See *Darwin v. Upton*, cited 3 T. R. 159; and later cases cited in 4 Jarm. Conv. 151.

(*t*) *Barker v. Richardson*, 4 B. & Ald. 579; as to the statutory title which may be acquired under the Acts, and which is independent of the title which may be acquired under the ordinary doctrine of presumption (*Welcome v. Upton*, 5 M. & W. 393; *Dewhurst v. Wrigley* 1 C.

P. Cooper, 329), *vide infra*; and as to the Prescription Act having superseded the necessity of presuming a lost grant, see Lord Westbury's judgment, in *Tapling v. Jones*, 11 H. L. Ca. 290; 34 L. J. N. S. C. P. 342.

(*u*) Elton on the Tenures of Kent, p. 183.

(*x*) *Ibid.* p. 197.

(*y*) *Ib.* p. 221.

(*z*) *Ib.* p. 280.

(*a*) Elton, *supra*.

Chap. VIII.
Sect. 4.

Of the formalities of deeds.

Notwithstanding mutilation.

Of livery of seisin.

Of appointment of Inclosure Commissioners.

Of deeds having been duly stamped.

But not of forms required by Law on

So, the formalities of a deed are readily presumed; for instance, sealing and delivery will be presumed from proof of signing, and the whole will (if the deed comes from proper custody) be presumed after thirty years without any proof at all (*b*); or within that time from proof of a deceased subscribing witness's handwriting (*c*): and this rule is not confined to deeds or wills, but extends to all written documents, provided that they purport to be thirty years old, and come from the proper custody (*d*). In a modern case, the House of Lords held that a parchment writing, purporting to be the first skin of an indenture consisting originally of two or more skins, and severed by a sharp instrument, but which came from the proper custody, was properly received in evidence in ejectment; and that the mutilation of a deed forms an objection rather to the value than to the admissibility of the evidence (*e*): so, livery of seisin will be presumed after twenty years' consistent possession (*f*): so it will be presumed that persons who have executed an award under the general Inclosure Act, were regularly appointed and took the necessary oaths (*g*): so, it will be presumed that an instrument, duly executed and which is lost, was also duly stamped (*h*); unless the particular circumstances of the case forbid such a conclusion; as where the instrument has been fraudulently destroyed by the party chargeable thereon, and it can be shown to have been unstamped when it came into his possession (*i*): so also that stamps, the amount of which is obliterated, were of the right amount (*k*): but the Courts will not presume that forms have been complied with, which the Legislature, upon

(*b*) As to loss of a seal, *vide supra*, p. 315.

(*c*) *Gresley on Ev.* 482.

(*d*) *Taylor*, p. 94. *Quære*, whether the rule applies to a deed under the seal of a corporation?

(*e*) *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 772, 775.

(*f*) *Ross v. Lloyd, Wright*, 123: and *see Doe v. Gardiner* 13 C. B. 232.

(*g*) *Casemajor v. Brode*, 5 Sim. 87,

98; 2 Myl. & K. 708.

(*h*) *Hart v. Hart*, 1 Ha. 1; and *see Hughes v. Clark*, 15 Jur. 480, C. P., case of a counterpart lease; *Cloasma-deuc v. Carrol*, 2 Jur. N. S. 474; 18 C. B. 36.

(*i*) *Smith v. Henley*, 1 Ph. 391; and *see Blair v. Ormond*, 1 De G. & S. 428.

(*k*) *Doe v. Coombe*, 6 Jur. 980, Q. B.

grounds of general policy, has made essential to the validity of an instrument; as, for instance, the enrolment under the Statute of Charitable Uses of the conveyance of an estate to trustees for a charity (*l*): nor will the Court presume the surrender of a prior life estate in order to set up a recovery, on the mere ground that, without it, there would have been no valid tenant to the præcipe (*m*): and there would seem to be, in general, a difficulty in presuming any fact or document which, had it ever occurred or existed, ought to remain on record.

Chap. VIII.
Sect. 6.

grounds of
general
policy;

nor, *semble*, of
matters of
record.

And it seems that, as a general rule between vendor and purchaser, the latter must admit, as presumptions, all matters which, in a Court of Law, the judge would clearly direct the jury to presume; but not matters as to which the judge would leave it to the jury to pronounce upon the effect of the evidence (*n*).

General rule
of pre-
sumption be-
tween vendor
and pur-
chaser.

And now, as between vendor and purchaser, under a contract made since 1874, and subject to any stipulation to the contrary in the contract, recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, are, unless and except so far as they shall be proved to be inaccurate, to be taken to be sufficient evidence of the truth of such facts, matters, and descriptions. It is conceived that this and the other rules laid down by sect. 2 of the recent Act, could not be held to apply to a case in which an option of purchase or right of pre-emption has been created on or before the 31st December, 1874, and is exercised so as to perfect the contract at a later date: but upon this, as upon some other points, the Act will probably have to be elucidated by judicial decision or future legislation (*o*).

Rule as to
recitals, &c.
being evidence
under the V. &
P. Act, 1874.

(*l*) *Doe v. Waterton*, 8 B. & Ald. 149; *Wright v. Smythies*, 10 East, 409.

(*m*) *Penny v. Allen*, 8 Jur. N. S. 273; 7 De G. M. & G. 409.

(*n*) *Emery v. Grocock*, 6 Madd. 54;

Hillary v. Waller, 12 Ves., see p. 270; see *Baldwin v. Peach*, 1 Y. & C. 453, which, however, was not a case between vendor and purchaser.

(*o*) 37 & 38 Vict., c. 78, sect. 2, sub-sect. 2.

Chap. VIII.
Book II.

**Evidence of
matters of
fact.**

**As to what
facts the pur-
chaser can
require to be
proved.**

As respects evidence upon matters of fact (other than documentary facts), it may, it is conceived, be laid down as a general rule, that a purchaser can, in strictness, require evidence of all facts material to the title from the date at which its regular deduction commences, whether such facts are to be used as positive or negative proofs; that is, of all facts whose existence must be either proved or assumed in order to establish affirmatively the vendor's title, *e.g.*, the heirship of a vendor who claims by descent; and of all facts the existence of which must be either proved or assumed in order to establish such title merely by displacing the known or presumptive title of others; *e.g.*, the failure, determination, or release of some prior estate or incumbrance the existence of which is either known, or may be presumed as between vendor and purchaser: so also, he may require a satisfactory explanation of matters which tend to impeach the validity or sufficiency of the abstracted instruments (*p*).

**Negative evi-
dence cannot
be required if
not in vendor's
possession or
power, but
vendor must,
if he can,
answer all
relevant
questions.**

But, as a general rule, a purchaser cannot compel the vendor to procure evidence for the purpose of negating mere possibilities; although he may require him to answer to the best of his knowledge any relevant question on the subject, and to furnish all evidence in his possession or power (*q*); *e.g.*, where a power has been created, and there is no trace of its subsequent execution, the purchaser, although he can require the vendor and his solicitors to state whether to their knowledge or belief the power was ever exercised, and may, perhaps, require the vendor to make a statutory declaration upon the point, cannot, it is conceived, call for such a declaration by any other person; neither can he require the vendor to search for judgments or other incumbrances; so, neither, where the title commences with a conveyance by a person who conveys as heir-at-law, can the purchaser require any other evidence of the

ancestor's intestacy than such (if any) as is in the vendor's possession (r); so, where a vendor is or has been married, the purchaser should inquire whether any settlement was executed on his marriage, and, if this were the case, may require to see the settlement if in the vendor's possession or power; but if the vendor cannot produce it or a copy, the purchaser, it is conceived, must rest content with his assurance or statutory declaration that it did not affect the property in question; although, as a matter of prudence, he should, of course, make inquiries of the wife's family on the subject. In fact, the general rule would seem to be, that, where a *prima facie* title is shown, the purchaser can require no evidence, not in the vendor's possession or power, tending to negative any matter, the existence of which may not be presumed, either from the contents or nature of the abstracted documents, or by the ordinary rules of Law or Equity.

And it seems that, where a *prima facie* title is shown, the purchaser cannot require from the vendor a general explanation of circumstances which the purchaser may consider to be of a doubtful character, but must confine himself to questions directed to the particular defect which he apprehends: where, for instance, a tenant for life with power of appointment exercised such power in favour of his eldest child, and the father and child then concurred in mortgaging the property (a transaction which is *prima facie* valid under the authority of *M^{rs} Queen v. Farquhar* (s),) upon a suit for specific performance, and an examination of the vendor upon interrogatories, an interrogatory as to the existence of an underhand agreement that the child should join in the mortgage was not excepted to by his counsel, and appears to have been considered unobjectionable by the Court; but a general interrogatory as to "what was his motive or object in making the appointment" was held to be inadmissible (t).

^a But vendor showing a *prima facie* title need not answer mere general fishing questions;

(r) Sug. 439.

Beav. 19.

(s) 11 Ves. 467; and see Cockcroft v. Sutcliffe, 2 Jur. N. S. 228; and compare *Hannah v. Hodgson*, 30

(t) *Pearce v. Pearce*, 1 De G. & S. 12, 16, & 17.

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Book 2.**

and need not
give explanations in
respect of an
adverse notice
which has not
been acted on ;

And where an appointment had been made under similar circumstances in favour of an eldest child who joined with the parents in mortgaging the estate, and upon the mortgagee attempting a sale one of the younger children gave notice to the purchaser not to complete, stating that the appointment was a fraud upon the power, but not alleging any fact in support of this assertion, and did not follow up the notice by any proceeding, it was held, that a good title was shown, and that the notice did not oblige the vendor to render any further explanations (*v*).

Where, however, at a sale by auction by mortgagees under their power, a person entitled to redeem made a tender of the principal and interest, which was refused, and the sale proceeded, it was held that the purchaser, who saw the tender made and refused, was bound to make further inquiry (*v*).

but has under
special cir-
cumstances
been required
to prove in
Equity a will
already estab-
lished by a
verdict at
Law.

And where a will had been executed in favour of (*inter alios*) the medical man and solicitor of the testator, and the heir-at-law disputed the will and brought an ejectment, but a verdict was given for the defendants, it was, nevertheless, held by Lord Cottenham, that a purchaser could require the devisees to file a bill to establish the will against the heir (*y*).

Vendor need
not disclose
confidential
communica-
tions.

It appears, that the purchaser cannot require the vendor to disclose confidential communications made by him to his solicitors or counsel, or cases laid before counsel respecting the property, although the same were made and prepared merely on behalf of the vendor, and not during a suit, or during a dispute, or after the threat of a suit (*z*).

(*u*) *Green v. Puleford*, 2 Beav. 70.

(*z*) *Jenkins v. Jones*, 6 Jur. N. S. 391.

(*y*) *Grove v. Bastard*, 12 Jur. 385 ; 2 Ph. 619 ; but the will being established, Lord Truro made him pay costs in the suit for specific performance, 1 De G. M. & G. 69 ; *infra*, Ch.

XVIII. ; and see *M'Culloch v. Gregory*, 3 K. & Jo. 12.

(*z*) *Pearce v. Pearce*, 1 De G. & S. 12 ; *infra*, Ch. XV. s. 5 ; and see further as to confidential communications *ante litem motam*, *Marfarian v. Rolt*, L. R. 14 Eq. 680 ; and cases there cited.

Where the title is derived through an heir who took possession upon the ground of the assumed invalidity of his ancestor's will, which professed to deal with the estate, a purchaser may require the production of the will or evidence of its contents (*a*): so, on a sale by a devisee or party claiming under him, the purchaser may require the production of any subsequent will or codicil, or evidence of its contents (*b*). What the rule may be in cases where a will is known to have existed, but there is nothing to indicate that it purported to affect the property in question, seems to be more doubtful. The purchaser would, no doubt, be entitled to see either the original or the best evidence of its contents which the vendor had the means of supplying (*c*); but if none such could be procured, and, after making inquiries on the subject, no special grounds for supposing the estate to be affected by the will were found to exist, the purchaser, it is conceived, would be obliged to take the title (*d*).

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Sect. 6.

Whether he must produce will as negative evidence, of heir's *prima facie* title.

Where codicils are referred to, but not abstracted, on the alleged ground that they do not affect the devise contained in the will, the purchaser should always require them to be produced, in order that he may satisfy himself that such is the case.

⁴
Codicils described as immaterial should be produced.

Where the title is deduced through trustees or mortgagees, the will of the last surviving trustee or mortgagee, though not containing any specific devise of trust or mortgage estates, should be abstracted, and probate or office copy produced, if it contains any general devise. It is frequently overlooked in the preparation of the abstract, that a mere general devise is sufficient to pass estates vested in the testator as trustee or mortgagee, unless from the form of the limitations, or from the purposes to which the testator has devoted the property, or from other circumstances, an intention can be inferred that trust and mortgage estates should

Will of surviving trustee or mortgagee should be produced.

(a) *Stevens v. Guppy*, 2 Sim. & St. 439.

(b) See and consider, *Howarth v. Smith*, 6 Sim. 161.

(c) See *Cooper v. Emery*, Hayes on Conv. 578, 3rd ed.

(d) See the remarks of Wigram, V.-C., 2 Ha. 260.

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not pass. What is sufficient evidence of such an intention can, in many cases, only be ascertained by an attentive perusal of the whole will. It appears to have been considered that the introduction into the devise of words of severance will not prevent such devise from operating upon trust and mortgage estates (e); but the case usually relied on as an authority seems scarcely to warrant such a conclusion (f): at any rate as respects trust estates.

How far
vendor bound
to furnish
proof of intestacy.

And it is the universal practice where a descent has occurred within a recent period, to require proof of the ancestor's intestacy as respects the property offered for sale, even although no trace of a will appears on the title: how far this can in strictness be insisted on (except as respects evidence which the vendor may have in his own possession or power, is perhaps doubtful the length of time which may be considered sufficient to render such evidence unimportant must depend upon the state of the particular title, where an estate has been repeatedly sold or mortgaged, an interval of thirty or forty years is generally considered satisfactory.

Purchaser
cannot require
copies of documents
produced as
negative evidence.

A purchaser is not entitled to copies of any instruments which are produced merely to negative a possibility, and which he could not have compelled the vendor to produce if they had not been in his possession

Statutory
declaration of
vendor when
insufficient.

The un-supported statutory declaration of the vendor as to a matter of fact material to the title, and peculiarly within his own knowledge, although very often accepted in practice, is not such evidence thereof as a purchaser is bound to accept (g); and it must be remembered that although statutory declarations by disinterested persons form in many cases the only evidence available to the conveyancer, and may be sufficient as between vendor and purchaser, such declarations

(e) See 1 Jarm. Wills, 661.

(f) *Ex parte Whitmore*, cited 1 Sand. Uses and Trusts, 389, n.; and

see comments on this case, 1 Jarm. Wills, 682.

(g) *Robson v. Bell*, 2 Beav. 17.

except in cases where the general rule is relaxed by reason of the deaths of the declarants and of the declarations being in respect to matters of pedigree, and made by members of the family, or being against the pecuniary or proprietary interests of the declarants, are not evidence in hostile litigation with third parties.

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Sect. 6.

The want of evidence of matters of fact (other than documentary), as well as of the existence of documents conferring a title, may, however, be supplied by presumption; and the rule laid down in *Emery v. Grocock* (h); as to a purchaser being bound to presume whatever a judge at Law would clearly direct a jury to presume, applies (it is conceived) generally, although not universally (i), to questions of matters of fact between vendor and purchaser (l).

Want of proof of material facts may be supplied by presumption.

Thus, where, in construing an ancient deed, a question arises as to what passed by the terms of a particular grant, modern usage and enjoyment for a number of years, is evidence to raise a presumption that the same course was adopted from an earlier period; and so to prove a similar usage and enjoyment at the date of the deed (l).

Evidence of modern usage as to what passed under ancient grants.

So, where, in 1801, an allotment under an Inclosure Act was made to A. in lieu of four acres of common field land, the Court, in 1847, assumed in the absence of evidence to the contrary, that the four acres formed part of five acres and a half of common land comprised in a deed dated in 1784 (m); but the vendor was held bound to make inquiries on the subject, and to produce the best evidence in his power of the

Presumption of identity of parcels.

(h) *Supra*, p. 326; 6 Madd. 54.

(i) See *Supra*, 399.

(k) See *Lapham v. Pike*, Rolls, 1831; cited in *Atkinson on Marketable Titles*, 397.

(l) See *Lord Waterpark v. Fennell*, 5 Jur. N. S. 1135; 7 H. L. Ca. 650; where the question was as to what

was included in the term "village" in a lease granted in 1704; and see also *Duke of Beaufort v. Mayor of Swansea*, 3 Exch. 413; and see *Rex v. Osbourne*, 4 East, 327; *Att.-Gen. v. Forster*, 10 Ves. 338; *Bailiffs, &c. of Evesbury v. Bricknell*, 2 Taunt. 120.

(m) *Major v. Ward*, 5 Ha. 604.

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five acres and a half having formed the only commonable land belonging to the allottee (n).

Of identity of individuals.

So, where a person, whose name and description correspond with those of a person previously named in the title, deals with the property in a manner consistent with the supposition of the two being identical, such identity must, in the absence of any reasonable grounds for suspicion, be assumed by a purchaser: this doctrine seems to be supported by a decision in the case of the *Bray Barony* (o), where it was held sufficient to identify A—described in the ancient record, as of B.—with a person named A in the pedigree, to show *aliunde* that the latter held land in B.

Of seisin.

Seisin may be presumed from facts which tend to show that the ancestor or testator acted as if he were the owner of the premises, *e.g.*, the production of leases which he has granted and which have been followed by possession or payment of rent (p), or of a grant of an annuity by a person in possession, and which states that A. B. is the legal owner of the fee *q*, or the production of receipts for rent given to persons who are proved *aliunde* (*e.g.*, by the production of land tax assessments, entries in parochial rate-books, &c.), to have been in the occupation of the premises, or by the declarations of such occupiers that they held of the party in question: but mere personal occupation, although sufficient to raise a presumption of title in ejectment (r), does not appear to have that effect as between vendor and purchaser (s).

(n) *S. C.*, 12 Jur. 476. And see *Garrard v. Tuck*, 9 C. B. 248. As to the identity of lands of ecclesiastical and collegiate corporations, see 2 & 3 Will. IV. c. 30; of enfranchised copyholds, see 4 & 5 Vict. c. 35, s. 21; and 15 & 16 Vict. c. 51, s. 24; and of lands charged with tithe-commutation rent-charges, see 1 Vict. c. 69, s. 9.

(o) Cited *Hub. on Ev.* 465.

(p) See *Clarkson v. Woodhouse*, 5 T. R. 412; *White v. Lisle*, 4 Madd. 214; *Welcome v. Upton*, 6 M. & W. 536.

(q) *Doe v. Coulthred*, 7 Ad. & E. 235.

(r) *Doe v. Penfold*, 8 Car. & P. 536.

(s) See 18 Van. 122; *Hub. on Ev.* 131.

* Strips of waste lying beside an ancient highway or a river are, together with the soil to the middle of the way of river, presumed to belong to the owner of the adjoining inclosed lands (t): this presumption, however, seems to arise only as between such owner and the lord of the manor; and does not apply as between parties deriving title through different conveyances from a former owner of both the inclosed and waste land (u); and, even as against the lord of the manor, although it is not essential that the encroachment should be contiguous to, or have any direct communication with, the adjoining enclosed lands (c), yet the presumption may be rebutted by the circumstance of the strip communicating with a common or other large piece of waste (y), or by the fact that other strips, lying along the same highway but not necessarily adjoining the *locus in quo* (z), are held adversely to the landowner (a); nor does the presumption arise where the highway is modern, as, e.g., where made under the General Inclosure Act (b). Accretions to riparian property, caused by the gradual action of the stream, follow in title the adjoining land.

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As respects
strips of
waste.

Seisin being once proved, or presumed, will be presumed to have continued until the contrary is shown (c).

Of continu-
ance of seisin.

Intestacy is a fact which, strictly speaking, does not admit of proof, but is merely matter of presumption: letters of administration are, in the absence of special circumstances, received by conveyancers as sufficient to raise the presumption; so is a will or probate of a will not affecting the estate in question, nor putting the heir to his election.

Of intestacy.

(t) 1 Jarm. Conv. by S. 79, and cases there cited; and, in particular, Lord Tenterden's judgment in *Steel v. Prickett*, 2 Stark. 463; *Dendy v. Simpson*, 6 Jur. N. S. 1197; 8 C. B. N. S. 433; *affid. in the Exch. Ch.* 7 Jur. N. S. 1058.

(u) *White v. Hill*, 6 Q. B. 487.

(c) *Earl of Lisburn v. Davis*, L. R.

1 C. P. 259, and *vide supra*, p.

(j) *Grise v. West*, 7 Taunt. 39.

(z) *Simpson v. Dendy*, 2 Jur. N. S. 642, in the Exch. Ch.

(a) *Doe v. Hampson*, 4 C. B. 267.

(b) *Ber v. Hatfield*, 4 Ad. & E. 156.

(c) *Cockman v. Farrar*, Sir T. Jones, 182.

Class VIII.
Part 2.

Of official ap-

Of person last
entitled
having been
the purchaser,
and stock of
descent.

So, it will be presumed that persons who have acted in official capacities were duly appointed thereto (d).

So, the statutory presumption that the person last entitled to land was the purchaser, and the stock of descent under the late Inheritance Act, will hold good as between vendor and purchaser (e). It has been observed, in a valuable work upon evidence (f), that the presumption cannot safely be relied on by the conveyancer, because it might, after completion, be shown in litigating the title that such owner had not purchased but inherited the land, and that the vendor, though the heir of the immediate, was not the heir of the more remote ancestor: this, no doubt, is true; but in every case of presumption there is likewise a risk of the conclusion being shown to be unfounded. And in a late case it has been decided, that until some proof to the contrary is adduced, a vendor may rely on the statutory presumption, without any obligation to produce affirmative evidence in his possession; though he is bound to disclose matters within his own knowledge which tend to rebut the presumption (g).

Presumption
in matters of
pedigree - of
legitimacy of
child born in
wedlock.

Thus also, (to come to matters of pedigree,) it is a general presumption of law that a child born in wedlock, even a day after the marriage (h), is the child of the husband: and this, although the parties have separated by voluntary agreement (i), and the wife be living in adultery (k): but the presumption does not arise in the case of a child born after an interval, exceeding the usual period of gestation, since the date of a divorce *à mensu et thoro* (l); or, it is imagined, since

(d) See, as to Inclosure Commissioners, *Casamajor v. Stride*, 5 Sim. 87, 98; 2 Myl. & K. 708; as to Churchwardens, *Garrill v. Utting*, 9 Jur. 1081, Ex.; as to Charity Trustees, *Att Gen v. Dalton*, 13 Beav. 141.

(e) See 3 & 4 WIL. IV. c. 106, s. 2; *Dorling v. Claydon*, 1 H. & M. 402.

(f) Hallbach, p. 121.
Dorling v. Claydon, 1 H. & M.

402.

(h) See Co. Litt. 244 a.

(i) *Parish of St. George v. St. Margaret*, 1 Bell. 123.

(k) *Bury v. Philpot*, 2 Myl. & K. 349; *Morris v. Dwyer*, 5 Cl. & F. 163; *Hargrave v. Hargrave*, 9 Beav. 555; *The Queen v. The Inhabitants of Mansfield*, 1 Q. B. 444.

(l) *Parish of St. George v. St. Margaret*, 1 Bell. 123.

the commencement of the suit in the Ecclesiastical Court. The ordinary presumption is not to be rebutted by circumstances which create only doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was, 1st, incompetent; 2ndly, entirely absent at the period during which the child must in the course of nature have been begotten; or 3rdly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse (*m*): and it also seems that where the interview between the husband and wife has not been such as to raise an irresistible presumption of the fact of sexual intercourse, the subsequent conduct of the parties may be referred to for the purpose of establishing the fact of non-intercourse; *e.g.*, the circumstance that the wife who was living in adultery concealed the birth of the child, that the husband acted up to his death as if no such child were in existence, and that the adulterer aided in concealing the birth and subsequently reared and educated the child and left it all his property by his will (*n*): the old doctrine of *quatuor maria* has been long exploded (*o*).

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How rebutted.

The evidence and declarations of the husband and wife are inadmissible for the purpose of establishing the fact of non-intercourse (*p*). It seems to have been considered that the rule is limited to this—that a married couple shall not be admitted to prove that they have had no connexion after

Declaration
of husband
and wife inad-
missible.

(*m*) *Per* Lord Langdale, in *Hargrave v. Hargrave*, 9 Beav. p. 555. His Lordship puts another case, *viz.*, that of "the entire absence of the husband, so as to have no intercourse or communication of any kind with the mother:" but this seems to be an unnecessary extension of what is above stated as the second proposition.

(*n*) *Morris v. Davies*, 5 Cl. & F. 163; *Saye and Sele Barony*, 1 H. L. C. 507; and see *Bury v. Philpot*, 3 Myl. & K. 349; *Clarke v. Maynard*, 6 Mad. 364; *Re Sinclair*, 17 Beav. 523; *Legge v*
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Edunde, 4 W. R. 71; 25 L. J. N. S. Ch. 125; *Plowes v. Bossey*, 2 D. G. & Sm. 145.

(*o*) See *Pendrell v. Pendrell*, 2 Stra. 925; and see, on the general subject, *Banbury Peerage case*, 1 Sim. & St. 153; *Morris v. Davies*, 5 Cl. & F. 262; Hub. on Ev. p. 393, *et seq.*; *Saye and Sele Barony*, 1 H. L. C. 507.

(*p*) See Hub. on Ev. 382, 383; and see 5 Cl. & F. 221; *Patchett v. Holgate*, 15 Jur. 306, V.-C. K. B.; but see also, *Hargrave v. Hargrave*, 2 Car. & Kir. 701.

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marriage, and that the issue born in due time after marriage is spurious (q); but the principle seems to apply equally to a case where it is sought to establish the illegitimacy of a child conceived before, but born after, the marriage, by proving from the admissions of husband or wife their non-intercourse at the time of its conception; and in one case the Court refused to allow the wife to be asked in cross-examination, whether her husband had, or had not, access to her before marriage (r).

Presumption
of marriage.

So, where evidence of marriage cannot be procured, the deficiency may be supplied by presumptions, arising either from cohabitation preceded by the usual preliminaries of marriage, or by the conduct and behaviour of the parties during cohabitation, and by the general reputation of the fact of marriage (s): for instance, in the cases of the *Roscommon Earldom* and *Stafford Barony* (t), the execution of marriage articles, and the grant of a Royal licence to the intended husband to marry his brother's widow, were respectively admitted as raising a presumption that the subsequent cohabitations had been preceded by marriage: so, in the case of the *Sage and Selw Barony* (u), the fact of the cohabiting parties having visited with families of respectability was successfully relied on as raising a presumption of marriage: so, in *Lord Ochiltree's case* (v), the baptism of a child as if legitimate was held to raise a like presumption: but where, as in Scotland, mere consent will constitute marriage, cohabitation, if in the beginning illicit, will continue to bear that character, unless it be clearly changed by the parties (y): so, in the *Shrewsbury Peerage case* (z), where it was necessary to prove a marriage between W. T. and M. D., and, in the absence of a certificate, the will of M. D.'s uncle was produced in these words, "All this I give to my nephew W. T.,"

(q) *Anon. v. Anon.*, 22 Beav. 481, 482.

(r) *Anon. v. Anon.*, 23 Beav. 273; 23 Beav. 481.

(s) *In re Nison*, 2 Jex. N. S. 970.

(t) Cited in Hub. on Ev. p. 257; and see, in ejectment, *Doe v. Grace-*

brook, 4 Q. B. 406.

(u) Cited in Hub. on Ev. p. 247.

(v) [*A Scotch peerage case*] Hub. on Ev. 249.

(y) *Lapley v. Grierson*, 1 H. L. C. 498, 500.

(z) 7 H. L. C. 1.

the production of the Act book from Doctors' Commons granting administration to "W. T., nephew, minor, and legatee," was held sufficient to raise a presumption of marriage between W. T. and M. D.

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Decisions, on such points, in Peerage claims, are, it may be remarked, of higher authority between vendor and purchaser than similar decisions, even by the House of Lords, in adverse claims to property; inasmuch as, the claimant of a Peerage, like a vendor, is required to show not merely a better title relatively to some other, but to show that the title is absolutely and exclusively in himself (a).

So, the mere *factum* of marriage being proved, the Law raises every possible presumption in favour of the existence of circumstances essential to its validity (b); but the Court will not presume a marriage according to the *lex loci* between persons living in the midst of an uncivilized community, unless first satisfied with the evidence as to the laws and customs of the natives in that respect (c).

Presumption
as to validity
of marriage,
the *factum*
being proved.

By the Legitimacy Declaration Act 1858 (d); any natural born subject of the Queen, or any person whose right to be deemed a natural born subject, depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate in England, may petition the Divorce Court for a decree declaring that he is the legitimate child of his parents; or that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage; or that his own marriage was or is valid; and power is given to the Court to determine the question of legitimacy,

As to the
Legitimacy
Declaration
Act 1858.

(a) See Hub. on Ev. 63.

(b) *Piers v. Piers*, 2 H. L. C. 331; *Dumoncel v. Dumoncel*, 13 Ir. Eq. 97; *Harrison v. Corp. of Southampton*, 4 De G. M. & G. 187; *Taylor*, 159; and see as to consent, *Re Birch*, 1 Beav. 358; *Reg. v. St. Mary Magdalen*, 2 El. & B. 209

(c) *Armitage v. Armitage*, L. R. 3 Eq. 343; and see further on this subject, and as to marriages entitled to the privilege of necessity, *Ruding v. Smith*, 2 Hagg. 371; *Bright's H. & W.* 418, *et seq.*

(d) 21 & 22 Vict. c. 93.

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or of the validity of any such marriage: but its decree is not to prejudice the rights of persons who are not cited, or to have a valid effect if obtained by fraud or collusion.

Presumption
of death :—as
between
vendor and
purchaser :

As between vendor and purchaser, no presumption of death arises from the mere fact of a person having been unheard of for seven years (*e*); nor can any precise period be fixed upon which will raise such a presumption; but every case must depend upon its own particular circumstances: for instance, in a case like that of the *President* steam vessel, never heard of after setting out to cross an open ocean like the Atlantic, the Courts would probably at the end of seven years presume the death of all parties on board, even as between vendor and purchaser (*f*); while they might hesitate, even after a very much longer period, to come to the same conclusion, between vendor and purchaser, in the case of a vessel supposed to have been lost in navigating an ocean, thickly studded with islands, like some parts of the Pacific.

as between
adverse
claimants to
property.

There have been many decisions upon the above point as between adverse claimants to property: for instance, the mere absence beyond seas of a mortgagor for thirty years without being heard of, was, in an old case, held sufficient to entitle the heir to redeem (*g*); so, as between parties claiming under a will, the death of the legatee has been presumed from absence in America without tidings or reply made to advertisements for twenty-two years (*h*); so, in *Cuthbert v. Pucrier* (*i*), where a fund was set apart to answer an annuity to a native woman in India, of whom nothing had been heard since 1815, Lord Cottenham, in 1837, ordered payment of the principal to the party entitled subject to the annuity, without requiring any security to find (*k*); so, in *Dowley v. Winfield* (*l*), (an administration

(*e*) *Hub. on Ev.* 179; as to evidence of sufficient inquiry, see *Doe v. Andrews*, 15 Q. B. 756.

(*f*) See *Willick v. Booth*, 1 Y. & C. C. 117.

Abt. 414.

(*h*) *Rust v. Baker*, 8 Sim. 443.

(*i*) 2 Ph. 199.

(*k*) 2 Ph. see p. 200.

(*l*) 14 Sim. 277; and see *Watson v. ...*

suit,) *Shadwell, V.-C.*, presumed the death of a legatee who, when of the age of seventeen, had deserted his ship at one of the Sandwich Islands, and had not been heard of for twelve years: and in a modern case his honour ordered payment out of Court of a sum of money to the administrators of a person who had gone to America and had not been heard of for seven years (*m*): but the Court will require evidence of all practicable inquiry having been made (*n*): and has refused to act on the common presumption when circumstances rendered it improbable that the absentee, if alive, would have communicated with his friends (*o*).

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The value of the non-receipt of intelligence of a person who has gone abroad, and has not been heard of for several years, and who cannot be presumed to have perished by some casualty, as the foundering of a vessel in which he is known to have been a passenger, must depend upon the special circumstances of each case; as, *e.g.*, the duration of his absence, and whether it can be satisfactorily explained or not—the nature of the last communication received, and whether the previous communications were frequent or intermittent—the station in life of the missing person, and the degree of relationship or intimacy subsisting between him and the persons with whom he was in the habit of corresponding. In many cases the mere non-receipt of tidings for a period of seven years is wholly insufficient to raise the presumption; and in all cases the evidence of those who are interested in proving the fact of death must be received with hesitation.

Non-receipt of tidings as raising presumption of death.

We may here remark, as connected with the present subject, that by the 13 Ch. II. c. 6. s. 2, if a person for whose life an estate is granted goes abroad, and there is no

Proof of death of cestui que vie.

(*m*) *Dunsmure v. Bouldeerson*, 5 Jur. 958; and see *Whitlow v. Dilworth*, 2 Sm. & G. 35, in which, however, there were special circumstances.

(*n*) *In re Creed*, 1 Dro. 235; see

In re Lyford, 17 Jur. 570.

(*o*) *Boeden v. Henderson*, 2 Sm. & G. 360; see *In re Milham*, 15 Beav. 507.

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Production of
cestui que vie.

Presumption
as to time of
death.

sufficient evidence that he is alive, the judge, in any action commenced for the recovery of the lands by the lessors or reversioners (*p*), shall direct the jury to give their verdict as if the person remaining abroad were dead: and by the 6 Anne, c. 18, s. 1, a reversioner or remainderman may, by proceedings in Chancery, procure the production of tenant for life or *cestui que vie* (*q*).

As respects the time of death, the presumption, in cases of adverse claims to property, used to be that the absentee died at the end of the first seven years after he was last heard of; unless there were special circumstances for raising a presumption, tantamount to proof, of death at an earlier period; as, *eg.* the fact of the party when last heard of being in a bad state of health, and having arranged to return to his friends in six months (*r*); or the state of weather succeeding the departure from port of a ship which is never afterwards heard of (*s*). In *Dumanev v. Stilwell* (*t*), a mate in the last Arctic Expedition under Sir John Franklin, which was never heard of since June, 1845, was, after considerable hesitation, presumed to have survived his father, who died in January, 1850. There was evidence that about forty of the expedition, which originally consisted of 133, were seen by Esquimaux in the month of April or May, 1850; and it was considered probable that this mate, who was a strong active young man, was among the number. In *Dowley v. Winfield* (*u*), the Court, in the absence of any special circumstances, presumed that the legatee, a sailor, who had left his ship in the spring of 1832, died before the death of the testator, which occurred in September, 1833; and the legatee's share was paid over to other parties on their giving security to refund: so, in *Cuthbert v. Purrier* (*x*), the Court

(*p*) This has been held to include remaindermen.

(*q*) As to mode of procedure, see *Daniell*, 1843, *et seq.*

(*r*) *Webster v. Birchmore*, 13 Ves. 362; *Re Lyford*, 11 Jur. 570.

(*s*) *Sillick v. Booth*, 1 Y. & C. C. C.

117.

(*t*) 23 Beav. 328.

(*u*) 14 Sim. 277.

(*x*) 2 Ph. 169, *supra*; and see *Grissall v. Stelfox*, 9 Jur. 890, V.-C. K. B.; *Wilcock v. Purchase*, 9 Jur. 891, V.-C. E.

ordered the entire accumulations of the annuity, from the time when the annuitant was last heard of, to be paid over to the party entitled subject to the annuity, on his giving his bond to refund: but these decisions cannot be reconciled with the later authorities (*y*) which in effect lay down, first, that although a person who has not been heard of for seven years is presumed to be dead, yet, in the absence of special circumstances, there is no presumption from that fact as to the particular period at which he died; secondly, that a person alive at a certain period of time, is to be presumed to be alive at the expiration of any reasonable period afterwards; and thirdly, that the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period. In a recent case (*z*), V.-C. Malins carried the doctrine still further, and laid it down that as the presumption of death does not arise until the expiration of the seven years, so within that period there is a presumption of the continuance of life; but, on appeal, the order of the V.-C. was discharged on the ground that the time of death is not a matter of presumption, but of affirmative proof (*a*): and this is now the well settled rule (*b*).

Presumptions, however, such as are above referred to, would not necessarily be made as between vendor and purchaser (*c*); and the above cases must be considered as guides, rather than as authorities, for the conveyancer. In *Dowley v. Winfield*, in particular, the presumption, not only of the time but even of the fact of the death, (admitting for argument's sake its propriety for the purpose of enabling the Court to distribute testamentary assets,) would evidently be of an extreme character if made upon a question of title.

Rules upon,
as between
adverse
claimants,
how far appli-
cable as
between
vendor and
purchaser.

(*y*) *Doe v. Nepean*, 5 B. & Ad. 86;
Nepean v. Doe, 2 M. & W. 894, 912;
Lambe v. Orton, 6 Jur. N. S. 61;
Dunn v. Snowden, 2 Dr. & Sm. 201;
Thomas v. Thomas, *ib.* 298; *re Phences'*
Trusts, L. R. 5 Ch. Ap. 189; *re Lewes'*
Trusts, L. R. 6 Ch. Ap. 356.

(*z*) *Re Benham's Trusts*, L. R. 4,

Eq. 416, 419.

(*a*) See L. R. 5 Ch. Ap. 141 note.

(*b*) See *Phences' Trusts*, L. R. 5 Ch. Ap., and judgment of L. J. Giffard; *re Lewes' Trusts*, L. R. 11 Eq. 236; L. R. 6 Ch. Ap. 356.

(*c*) See Sug. 418.

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The mere fact of a young sailor, who deserted his ship in the Sandwich Islands, not being heard of for twelve years, can scarcely, as a matter of common sense, be considered to raise a stronger presumption of his death, than would the lapse of an equal interval of time in the case of any other person of the same age respecting whose existence no inquiry whatever had been made. In such cases the Court may be supposed to be (perhaps insensibly) influenced not only by a supposition that the party may be dead, but by the feeling that, if alive, he will probably never return to claim the property. It has, moreover, been observed by the same learned judge who decided *Dowley v. Winfield*, that the old presumption of death from absence, is, owing to the increased facilities of travelling, becoming daily more untenable (*d*). In one case, after absence and silence for nineteen years, the Court refused to presume death when the circumstances rendered it improbable that the party, if alive, would have communicated with her friends (*e*). The recent notorious litigation in respect to the Tichborne estates is suggestive of the difficulties which may surround a title which depends upon mere presumptive evidence of death.

**Presumption
as to sur-
vivorship.**

There is no presumption of law arising from age or sex as to survivorship among persons who perish by the same casualty; nor, on the other hand, is there any presumption that they all died at the same moment. The question is one merely of fact, depending entirely upon the evidence; and if no evidence on the point can be adduced, the law treats the matter as incapable of being determined (*f*).

**Presumption
of failure of
issue.**

Failure of issue is a negative fact of which no evidence, strictly speaking, is capable of being given: all that can be done is to prove facts which raise a presumption of the want of issue: this proof, according to Mr. Hubback (*g*), may

(*d*) See *Watson v. England*, 14 Sim. 22; *Hamming v. Spiers*, 15 Sim. 550.

(*e*) *Bowden v. Henderson*, 2 Sm. & G. 360.

(*f*) *Wing v. Angrave*, 8 H. L. Co.

188; and see *Underwood v. Wing*, 4 De G. M. & G. 633. But see *Osmancy v. Stowell*, 23 Beav. 323, *supra* p. 342, *et quare*.

(*g*) Page 203.

consist "either of the testimony of living witnesses having the means of knowledge (*h*), the declarations of deceased relatives, or family reputation otherwise established," and which appears to extend to indirect or circumstantial declarations (*i*), and (in conveyancing practice), to include declarations or affidavits by persons acquainted with, although not actually members of, the family (*k*); "or of facts or circumstances irreconcilable with, or opposed to, the hypothesis that there are any legitimate descendants of the supposed ancestor;" such as facts which tend to show the celibacy of the party (*l*); the non-mention of issue in wills (*m*) and other documents in which issue, if existing, would naturally be noticed; and the devolution of dignities or property upon the assumption of the want of issue; or the grant of letters of administration to distant relatives.

Many cases have occurred in which the Court of Chancery has paid out of Court money, the title to which depended upon the presumption that females of advanced age were incapable of having issue (*n*): fifty-five, or, according to an unreported case (*o*), fifty-three appears to have been the earliest age at which such a presumption has been acted on, the female being unmarried, and the parties receiving the money being required to enter into their recognizances to refund in the event of her marrying and having issue: in a case (*p*), where the woman was fifty-eight and unmarried,

Presumption
against aged
females having
future issue.

(*h*) As to which see the case of *Hemming v. Spters*, 15 Sim. 550 (a case between vendor and purchaser); and the cases upon Peerage claims, cited *Hub. on Ev.* p. 204.

(*i*) See cases on Peerage claims, cited *Hub. on Ev.* p. 205.

(*k*) *Ibid.* 230.

(*l*) See *Hemming v. Spters*, 15 Sim. 550.

(*m*) *Hungate v. Gascoyne*, 2 Ph. 25.

(*n*) See *Leng v. Hodges*, Jac. 585; *Brown v. Pringle*, 4 Ha. 124, and earlier cases there cited: see the judgment in *Brandon v. Woodthorpe*, 10 Beav. 403, where the practice was

admitted, although from other circumstances payment was refused. Forty-nine was held to be too early in *Re Overhill*, 17 Jur. 342; but see cases cited *infra*, n. (*p*). The author has been informed, upon respectable medical authority, that the peculiar effect of the Australian climate upon the English constitution, is often to induce pregnancy in female emigrants who have passed the usual period of childbearing before leaving England.

(*o*) *Forty v. Reay*, stated in *M. Dig.*, V.-C. K., 11th Feb., 1853.

(*p*) *Miles v. Knight*, 12 Jur. 606; *Edwards v. Tuck*, 23 Beav. 268; the

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Shadwell, V.-C., ordered payment without requiring any recognizance. Lord St. Leonards appears to think that the presumption that a woman of advanced age is past child-bearing would not be made against a purchaser (g); and, so far as we are aware, there is not any reported case in which a title dependent on such a presumption has been forced upon a purchaser: but upon general principles, it would seem that such a course would, if necessary, be adopted; it being a moral, and not a mathematical certainty, of a good title, which a purchaser can require from a vendor (r). The Courts do not appear to act upon a similar presumption in the case of a male (s), and there are obvious reasons why the doctrine should not be so extended.

Births, marriages, and deaths; proved by extracts from parochial and general registers.

The ordinary evidence of the facts of birth, marriage, and death (t), consists of certified extracts from the parochial registers, or from the general register, established by the 6 & 7 Will. IV. c. 86, and amended by the 1 Vict. c. 22: or, as regards deaths, from the burial registers established by the 16 & 17 Vict. c. 134 s. 8: and by declarations as to the identity of the parties. The parochial registers are not, as a general rule, evidence of the time or order of birth (u); although they may go far to enable the practitioner to form an opinion upon these points; nor do they seem to be evidence of the time of death, except so far as by showing that it must have occurred before the date of the burial, of which they seem to be evidence (v); and they are evidence of the time as well as of the fact of marriage (y). Under the 6 & 7

woman being unmarried and fifty-eight: so in *Dodd v. Wake*, 5 De G. & S. 226, the woman being sixty-four; so, in *re Widow's Trusts*, L. R. 11 Eq. 408, one of the parties being a widow aged fifty-five years and four months, who had never had any children, and the other a spinster aged fifty-three years and nine months; so, in *re Milner's Estate*, L. R. 14 Eq. 248, case of a married woman aged forty-nine years and nine months, who had never had any child.

(g) Sug. V. & P. 418.

(r) 2 Atk. 19; see 12 Ves. 252.

(s) See and consider *Trevor v. Trevor*, 2 Myl. & K. 677; *Lushington v. Bolero*, 15 Beav. 2.

(t) As to recital of death of *centumque vie* in renewed, Ecclesiastical Lease being evidence, *vide suprd*, p. 314.

(u) See 1 Moo. & R. 889.

(v) Hub. on Ev. 184.

(y) *Doe v. Barnes*, 1 Moo. & R. 886. See 14 & 15 Vict. c. 97, s. 25, remedy.

Will. IV. c. 86, the birth or death, and not the baptism or burial, is the subject of registration; the date forms part of the entry required by the Act, and certified copies of the entries are to be received as evidence of the birth, death, or marriage, to which the same relate (*z*): it may, however, be doubted whether a purchaser could be compelled to accept a certificate of death as evidence of the fact, unless some sufficient reason were given for the non-production of the certificate of burial (*a*). Extracts from non-parochial registers have long been received by conveyancers as evidence; and by the 3 & 4 Vict. c. 92, the non-parochial registers deposited under the provisions of that Act (*b*), and certified extracts therefrom (*c*), are made evidence in the Courts of Law and Equity (*d*).

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In the absence of evidence of the above description, resort is necessarily had to evidence of a less formal character: such as declarations by members of the family (*e*), whether such declarations be made expressly for the purpose of evidence, or consist of recitals in deeds or wills, statements in pleadings in Chancery, &c. The declaration of a wife as to the state of her husband's family is equally admissible

How otherwise proved;
—by declarations, &c.;

ing errors in the solemnization in certain cases. As to the identification of extracts from the parochial registers, see 14 & 15 Vict. c. 99, ss. 11 & 17; *Re Porters' Trust*, 2 Jur. N. S. 349; *Re Neddy Hall's Estate*, 17 Jur. 29; incorrectly reported, 2 De G. M. & G. 748.

(*z*) Sect. 38.

(*a*) See *Att.-Gen. v. Culcervell*, *R.* cited in *Hub. on Ev.* 760; and *Leach v. Leach*, V.-C. K. B., 8 Jur. 211; but see *Parkinson v. Francis*, 15 Sim. 160. In *Tomlins v. Tomlins*, 3 Jur. 167, *Shadwell V.-C.*, decided, that the certificate of a district registrar is not evidence under the Act; in the later case of *Trail v. Kibblesmith*, 10 Jur. 107, the same learned Judge is stated to have acted upon such a certificate; but his attention does not seem to have been directed to the

distinction between a District Registrar's, and the Registrar General's certificate.

(*b*) For a list of which, see *Hub. on Ev.* p. 772.

(*c*) See Sects. 11 & 13.

(*d*) Attested copies of French registers were received in a modern Peerage case, upon the evidence of a French advocate that the registers were kept according to the French Law, and would be received in the French Courts: *Perth Earldom*, 2 H. L. Ca. 865. See 14 & 15 Vict. c. 99, s. 7.

(*e*) See the remarks of Lord Langdale upon the little value to be attributed to traditional evidence in Pedigree cases, in *Johnston v. Todd*, 5 Beav. 597; and see *Crouch v. Hooper*, 16 Beav. 182; *Webb v. Haycock*, 10 Beav. 342.

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records of
Heralds'
College;

entries in
books, &c.;

old pedigrees;

inscriptions,
&c.

with that of a husband as to the state of his wife's family (*f*); but before such a declaration can be admitted in evidence, the relationship of the declarant *de jure* by blood or marriage must be established by testimony independent of the declaration itself (*g*). Such evidence is inadmissible in Court during the lifetime of the parties; but, in conveyancing, statutory declarations form the only available means of preserving the testimony of living witnesses, and, after their deaths, become admissible in Court; and where such declarations by relations cannot be procured, conveyancers act upon similar declarations made by strangers who have been acquainted with the family, although such declarations are inadmissible in Court (*h*), unless made contrary to the proprietary or pecuniary (*i*) interest of the declarant. So, records or books from the Herald's College, if kept under the authority of any official order, or in the discharge of any official duty, are admitted as evidence (*k*): so, statements of pedigree contained in letters, or entries in books, whether religious or otherwise (*l*), are admissible in Court, if the handwriting be proved to be that of a deceased member of the family (*m*): so also, old statements of pedigree are held admissible, on account of their public exposure to and recognition by the family, even although they cannot be distinctly attributed to any particular member of it: *e.g.*, monumental inscriptions (*n*), an authenticated copy of a mural inscription in the parish church (*o*),

(*f*) *Shrewsbury Peerage case*, 7 H. L. Ca. 1.

(*g*) *Plant v. Taylor*, 3 Jur. N. S. 140; 7 H. & N. 211, and see 1 Tayl. Ev. 526, n; *Smith v. Tobitt*, L. R. 1 P. & D. 354.

(*h*) *Johnson v. Lawson*, 2 Bing. 86; *Cresser v. Barrett*, 1 Cr. M. & R. 928; *Carey v. O'Shaunessy*, 7 Jur. 1140, P. C.

(*i*) See *Sussex Peerage case*, 11 Cl. & F. 85, 112; *Lloyd v. Wall*, 1 Ph. 61.

(*k*) *Shrewsbury Peerage case*, 7 H. L. Ca. 1.

(*l*) See *Herbert v. Tuckal*, Sir T.

Raym. 84; *Berkley Peerage case*, 4 Camp. 418; *Slane Peerage case*, 5 Cl. & F. 24; *Tracy Peerage*, 10 Cl. & F. 154; but see *Walker v. Lady Beauchamp*, 6 Car. & Pa. 552.

(*m*) As to proof of, which, see *The Fitzcarter Peerage*, 10 Cl. & F. 198; *Tracy Peerage*, 10 Cl. & F. 154.

(*n*) See *Peerage Cases*, cited Hub. on Ev. 688; and see 10 Cl. & F. 154; *Shrewsbury Peerage case*, 7 H. L. Ca. 1.

(*o*) *Slaney v. Wade*, 1 Myl. & C. 338; and see *in re Perth Burdett*, 2 H. L. Ca. 376.

coffin plates (*p*), inscriptions upon the walls of the mansion house (*q*), pedigrees hung up in the mansion (*r*), or preserved in the family library (*s*), entries in a family Bible, or, it would appear, in any other book which had been treated by the family as being in the nature of a family register (*t*); and, if coming from proper custody, no evidence of their authorship or handwriting is required (*u*): so, also, a pedigree presented by a third person to a member of the family, and recognized by him, is admissible in proof of the relationship of persons therein described as living, and who might be presumed to be personally known to him, even although the general pedigree be inadmissible by reason of its purporting to be collected from registers, wills, &c., and *history* (*x*): but a printed collection of monumental inscriptions was rejected as evidence of what had been the inscription on a partly-defaced tomb (*y*): so, a case for the opinion of counsel seems to be inadmissible, as being generally drawn by the solicitor and not by the party himself, and being often framed with a view to drive the opposite party to a reference, or for other purposes (*z*).

And it seems probable that such evidence is admissible to prove not only the facts of birth, marriage, and death, but also such collateral matters (*e.g.*, the local derivation of the family), as tend to show the identity of the parties (*a*).

Whether admissible in proof of collateral matters.

All such evidence is generally inadmissible if made during existing (*b*), or with a view to anticipated (*c*) litigation or

Such declarations must be made "*ante*

(*p*) *Hub. on Ev.* 693. Coffin plates and monumental inscriptions frequently misstate the age by reducing it a year; *anno aetatis* being Undertakers' Latin for *aged*.

(*q*) *Camoy's Barony*, 6 Cl. & F. 801.

(*r*) See 1 Myl. & C. 356.

(*s*) *Camoy's Barony*, 6 Cl. & F. 802; and see *Davies v. Lowndes*, 7 Sc. N. R. 141; and *In re Perth Earldom*, 2 H. L. Ca. 876.

(*t*) See 2 Rm. & M. 162; *Hood v. Benuchamp*, 8 Sim. 26; *Slane Peerage case*, 5 Cl. & F. 24; *Berkely Peerage case*, 4 Camp. 418.

(*u*) *Hubbard v. Lees*, L. R. 1 Ex. 255.

(*x*) *Davies v. Lowndes*, 7 Sc. N. R. 141, 214.

(*y*) *Shrewsbury Peerage case*, 7 H. L. Ca. 1. A photograph of a subsequently defaced inscription would probably be now received in evidence.

(*z*) *Slane Peerage*, 5 Cl. & F. 40.

(*a*) See *Shields v. Boucher*, 1 D. G. & S. 40, and cases there cited; and *Doe v. Davies*, 11 Jur. 607; 10 Q. B. 314; *Lloyd v. Wait*, 1 Ph. 61.

(*b*) 6 Ir. Eq. R. 348; see *Taylor on Ev.* 412.

(*c*) *Slane Peerage*, 5 Cl. & F. 23.

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litem motam—
—extent of
the rule.

controversy involving the point in question: it seems, however, that the mere fact of the declarant having a distinct object in view in making his declaration, *e.g.*, the prevention of disputes in a family, will not render the declaration inadmissible, although such object can only be gained by using the declaration in evidence (*d*): and, in a peerage case cited by Mr. Hubbuck (*e*), a pedigree transmitted by a father to his son, with a view to induce him to make a claim to the peerage, which, however, never was made, was held admissible as evidence in favour of a party claiming through an elder branch of the family.

What is a
lis mota?

Whether the mere existence of that state of facts which may lead to a controversy is a *lis mota* within the above rule is doubtful (*f*): the modern authorities seem to be opposed to such a doctrine. It was held in *Slaney v. Wade* (*g*), that a copy of an ancient mural inscription was not rendered inadmissible in evidence by reason of its having been made at the time when it was known that, on the death of a tenant for life of the family estates, questions would possibly arise as to who was entitled under a limitation in a will to the testator's right heirs.

Declaration
by party in
the like in-
terest ad-
missible.

A declaration is not rendered inadmissible in evidence by reason of the declarant, and the party relying on his declaration, having been in the same situation with respect to the matter in question (*h*).

Recitals,
when evidence
of pedigree.

And, as against third parties (*i*), recitals in a deed are not evidence, unless the deed was executed by some disinterested

(*d*) See 2 Russ. & M. 164; *Berkley Peerage case*, 4 Camp. 418; *Slaney v. Wade*, 1 Myl. & C. 338.

(*e*) *Airth Earldom*, Hub. on Ev. 663.

(*f*) See *Darice v. Lowndes*, 7 Sc. N. B. 198, 214; and *Walker v. Earl Beauchamp*, and other cases there referred to; *Slaney v. Wade*, 1 Myl. & C. 338; *Monkton v. Att.-Gen.*, 2

Russ. & M. 147; *Railly v. Fitzgerald*, 6 Ir. Eq. R. 335.

(*g*) 1 Myl. & C. 338.

(*h*) *Monkton v. Att.-Gen.*, 2 Russ. & M. 157; *Doe d. Tilman v. Turner*, 1 Ry. & Mo. 141; *Doe v. Darice*, 11 Jur. 607; 10 Q. B. 314.

(*i*) Including persons named as parties, but who do not execute, see *Tull v. Owen*, 4 Y. & C. 192.

member of the family (k). In a case where a conveyance by parties claiming as heiresses of the bodies of two female joint-tenants in tail recited their pedigree, this recital of their title by the then vendors was held to be no evidence against a subsequent purchaser, although the deed was thirty years old; there being nothing to show that the previous possession had been consistent with the pedigree (l): but in an ejectment case, where a person entitled in remainder joined with the tenant for life (who was her relation), in selling the property, and the conveyance recited that she was the daughter of J. D., and the conveyance was executed by the tenant for life, the recital was held by the Court of Queen's Bench to be evidence of the fact, "no dispute having existed, and the parties having done that which they had a right to do if members of the family" (m).

By the 37 & 38 Vict. c. 78 (n), recitals, &c., in Acts of Parliament twenty years old are, as between vendor and purchaser, made sufficient evidence of the truth of the facts and matters stated, except so far as they may be disproved; and, apparently, there is no distinction between a public and a private Act as regards the application of this rule. Except so far as it may have been altered by this enactment, the general rule is that recitals in recent private Acts of Parliament are not evidence of the facts stated in them, inasmuch as it is no longer the practice to submit the evidence in support of private bills to the judges for their report upon it (o). The Court of Chancery has refused to act upon the recital of a death in a private Act on the application of a person claiming under the Act (p).

Recitals in
private Acts
of Parliament.

(k) *Slaney v. Wade*, 1 Myl & C. 338; (but see the judgment of the V.-C. *contrâ*, 7 Sim. 614;) see *Doe v. Davies*, 10 Q. B. 314, 325; and see now 37 & 38 Vict. c. 78, sect. 2.

(l) *Fort v. Clarke*, 1 Russ. 601.

(m) *Doe v. Davies*; 10 Q. B. 314.

(n) See sect. 2.

(o) *Shrewsbury Peetage case*, 7 H. L. Ca. 1.

(p) *Cowell v. Chambers*, 21 Beav. 619; *Moulton v. Edmonds*, 1 De G. F. & Jo. 240.

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Land tax—
 of, how
 proved.

Land tax, if not noticed in the agreement, is presumed to be a charge on the property; if stated to be redeemed its redemption should be shown by the certificate of the Commissioners, the receipt of the cashier of the Bank of England, and memorandum of registration (q): the loss of the receipt is not, however, of any real importance; for, as a matter of practice, the certificate is never issued before the money is paid. In one case (r), where an estate was described as land-tax redeemed, a statutory declaration by a former owner that no land tax had been paid in respect of the land, "subsequently to the purchase or redemption thereof, in or about the year 1799," was held insufficient to satisfy a purchaser; for it left it doubtful whether the land tax ever was redeemed, so as to free the land from liability either to the Crown or to a purchaser under the 42 Geo. III. c. 116, or his representatives: and in the same case it was also held, that a statement in the operative part of a conveyance that the consideration was for the absolute purchase of the land "free from land tax," did not fall within the usual condition making deeds of a specified age conclusive evidence of every thing recited or stated therein.

Tithe, also, is a burden the existence of which is presumed in the absence of agreement. The Law upon the subject is rapidly becoming less important under the provisions of the

(q) See 42 Geo. III. c. 116, s. 38. See as to sales for redemption of the tax, *Hicks v. Morant*, 5 Bl. N. S. 643, N. C. 2 Duv. & C. 414, *Laurie v. Laurie*, 2 Duv. 556. As to the right of a remainderman to pay off the representatives of a tenant for life who redeemed the land tax out of his own money, see *Cousins v. Harris*, 12 Q. B. 728. As to merger of redeemed land tax, see *Blandell v. Stanley*, 3 De G. & S. 433; *Bulkeley v. Hope*, 1 K. & J. 482; *Neame v. Moorsom*, L. R. 3 Eq. 91; when redeemed by ecclesiastical incumbent, *Kilmer v. Ambrose*, 10 Exch. 454. It should be remembered that land tax redeemed by a

person having a limited interest under the 38 George III. c. 60, or under 42 Geo. III. c. 116, sec. 123, is personal estate; but a fee farm rent in lieu of land tax, purchased under the 42 Geo. III. c. 116, is real estate. Under the 16 & 17 Vict. c. 117, s. 2, merger took place in every case of redemption under a contract entered into after the 20th August, 1853; but as regards contracts entered into after the 29th July, 1856, this section was repealed by 19 & 20 Vict. c. 60, s. 3.

(r) *Buchanan v. Pappleton*, 4 Com. Ben. N. S. 46; 4 Jur. N. S. 414.

Tithe Commutation Acts (s): the Commissioners acting under which have power, in making their award (t), to decide, as between tithe owner and land owner (u), but not as between rival claimants of tithe (x), all questions as to the existence of any modus, or composition real or prescriptive, or customary payment, or any claim of exemption from or non-liability to payment of tithes (y); and their decision, unless reversed on an appeal brought within three calendar months after its being notified in writing to the parties interested, or their agents (z), is binding and conclusive: and no further time will be allowed by reason of the benefice becoming vacant, after the commencement, but before the expiration of the three months (a). There are exceptions of tithes of fish and fishing, and of mineral tithes, of payments instead of tithes in the City of London, and of permanent rent-charges payable in any city or town by custom or any local Act of Parliament (b); but, with these exceptions, all questions as to the existence or amount of liabilities of this

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Commutation
of, under late
Acts.

Decision of
Commission-
ers conclusive,
if no appeal.

(s) 6 & 7 Will. IV. c. 71; and see supplementary Acts, 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 23 & 24 Vict. c. 81; 25 & 26 Vict. c. 73; and see the important additional provisions contained in 23 & 24 Vict. c. 93. The tithe, or commutation rent-charge, may, under the 6 & 7 Will. IV. c. 71, s. 71, be merged by the tenant in fee or in tail thereof; or, under 1 & 2 Vict. c. 64, by any person or persons seized of, or having power to acquire, the fee therein, s. 1; or by tenant for life in possession of both land and tithe, &c., s. 3; and the merger may be effected in copyholds, s. 4; or, under 2 & 3 Vict. c. 62, s. 6, by persons holding glebe or other lands, and the tithes, &c., by virtue of any benefice, or *ex officio*. By sect. 1 of the same Act, incumbrances upon merged tithes, &c., are made primary charges on the lands

themselves: and by the 9 & 10 Vict. c. 73, s. 19, the powers of merger given by former Acts are extended, retrospectively and prospectively, so as to give equitable owners a power of legal merger, but so as to make charges on the tithe, &c., primary charges on the land.

(t) And which, if purporting to be sealed with the seal of the Commissioners, is made evidence by s. 2 of 6 & 7 Will. IV. c. 71.

(u) See *Walker v. Bentley*, 9 Ha. 629, 635.

(x) *Reg. v. Tithe Commissioners*, 15 Q. B. 620.

(y) 6 & 7 Will. IV. c. 71, s. 45; see *Wetherell v. Wreghill*, 3 Y. & C. 249; and see 5 & 6 Vict. c. 54, s. 10; *Reg. v. Tithe Commissioners*, 14 Q. B. 459; 18 Q. B. 156; *Shepherd v. Lord Londonderry*, 18 Q. B. 145.

(z) Sect. 46.

(a) *Homfray v. Scroope*, 13 Q. B. 509.

(b) Sect. 90.

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description will eventually depend, and do already as respects a great part of the country depend, upon the Commissioners' award (c) for the particular district.

**As to liability
under special
apportion-
ments.**

It must be borne in mind that under the 58th sect. of the 6 & 7 Will. IV. c. 71, the commutation rent-charge may be specially apportioned; so as to throw the amount attributable to the tithes of an entire estate upon some particular portion of it in exoneration of the residue. Of course when this has happened, the contract or conditions should state either the fact or the amount actually payable. It must also be remembered in cases where any lands in a parish have been cultivated as hop grounds, orchards or market gardens, that the Commissioners may (under sect. 40) have assigned a district within which all lands so cultivated are to be subject to an extraordinary *average* charge in addition to the ordinary charge which affects them as comprised in the titheable parts of the parish: and that lands within such a district, although waste and unproductive at the date of award, or even if relieved from the ordinary charge by an apportionment under the 58th section, become under the 42nd section subject to this extraordinary charge upon their being subsequently brought under any of the above special modes of cultivation (d): and it seems (e) that as facts arise which warrant such a proceeding, a supplemental award assigning such a district may at any time be made by the Commissioners.

**As to ex-
traordinary
charges on
hop grounds,
orchards, and
gardens.**

**Composition,
modus, or
exemption,
how proved.**

As respects those localities in which the tithe has not yet been commuted, it may be sufficient to state shortly, that a composition real can be established only by direct or presumptive proof of its creation by deed before the 13 Eliz. (f); and that before the passing of the 2 & 3 Will. IV. c. 100, a modus could be established only by similar proof of its constant payment from the time of legal memory (g); and that

(c) 6 & 7 Will. IV. c. 71, ss. 52 and 67; and see 2 & 3 Vict. 62, s. 8.

(d) *Welsh v. Trimmer*, L. R. 2 E. & J. 4p. 266.

(e) *Russell v. Tithe Commissioners*,

L. R. 6 C. P. 594.

(f) See *Shibson v. Kingscott*, 4 Madd. 144; *West v. Rob*, 1 Y. & C. 1.

(g) See 2 Mac. & G. 261.

to prove an exemption from tithe, it was necessary to show that the land had belonged to one of the greater monasteries, and was held by such monastery discharged from tithe at the time of its dissolution (*h*). By the 2 & 3 Will. IV., c. 100 (*i*), a modus (*j*) or exemption may be absolutely established as against the Crown or Duchy of Cornwall, or any lay person, (not being a corporation sole,) or any corporation aggregate, whether spiritual or temporal, by proof of payment of the modus, or enjoyment of the land free from tithe, during sixty years next before the time of the demand; and as against any corporation sole, by proof of such payment or enjoyment during two successive incumbencies, (or sixty years, whichever shall be the longer period,) and three years after the appointment and institution or induction of a third incumbent (*k*): but the Act does not extend to cases where the modus or enjoyment can be referred to an agreement in writing, or where the enjoyment has not been *as of right* (*l*): and in cases where, at the date of the Act, the tithes were in lease by deed, or subject to a temporary composition in writing, a period of three years is allowed to the tithe owner after the determination of the term of demise or composition (*m*); and the time during which the lands are held by the tithe owner is excluded from the period of computation (*n*). It was, after opposite judicial decisions (*o*), decided by Lord Cottenham, C., in conformity with the opinions of eight of the twelve judges, that, in order to bring land within the operation of the above Act for the purpose of claiming an

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Proof of,
how far
facilitated by
2 & 3 Will. IV.
c. 100.

(*h*) 1 Ha. 203; and see 1 Mac. & G. 261; and *Barnes v. Stuart*, 1 Y & C. 119.

(*i*) Amended by 4 & 5 Will. IV. c. 83.

(*j*) A custom for the Lord of a Manor to receive a tenth of all titheable matters in the manor, and to pay a yearly sum to the rector in lieu of tithe, is not within the Statute; see *Knight v. Marquis of Waterford*, 15 M. & W. 419; see 11 Cl. & F. 653; *Thorp v. Plowden*, 14 M. & W. 520; *Young v. Clara Hall*, 17 Q. B. 529.

(*k*) Sect. 1; see, as to evidence under this section, *Stamford (Earl of)*

v. Dunbar, 13 M. & W. 822; *Pearson v. Beck*, 21 L. T. 21; the shorter period of thirty years during which there is only a *prima facie* and not an absolute claim, does not appear to be material as between vendor and purchaser; see s. 6 of Act.

(*l*) *Salkeld v. Johnston*, 2 Exch. 256, 280.

(*m*) Sect. 4.

(*n*) Sect. 5.

(*o*) See *Salkeld v. Johnston*, 1 Ha. 196; *S. C.*, 2 C. B. 749; 2 Exch. 256; *Fellowes v. Clay*, 4 Q. B. 313.

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exemption from tithe, it is not necessary to prove its original capacity for exemption by showing that it belonged to one of the greater monasteries (*p*). The Act, it may be observed, does not prevent a party from pleading a modus from time immemorial, and proving it by the same evidence as he might have done before the statute.

**Tithes, how
affected by
Statute of
Limitations.**

The 3 & 4 Will IV. c. 27, s. 2, which enacts that no person shall bring an action to recover any land (which by section 1 includes tithes, unless belonging to a spiritual or eleemosynary corporation sole), but within twenty years next after the right accrued, has been held, by the Court of Exchequer, not to prevent the tithe owner from recovering tithes as chattels from the occupier, although none have been set out for twenty years; but to be confined to cases where there are two parties claiming adverse estates in the tithes (*q*).

**Defects in
title, when
supplied by
Prescription
Act, and
Statute of
Limitations.**

Defects in the early title, or in the evidence thereof, are occasionally rendered immaterial by the 2 & 3 Will IV. c. 71, and 3 & 4 Will IV. c. 27.

**Nature of title
under Pro-
scription Act.**

With general reference to the former (commonly known as the Prescription Act), we may observe that there is nothing in the Act which interferes with a claim to an easement by express grant; or which prevents a claimant from proceeding according to the Common Law, if he elects to do so: but where reliance is placed on the Statute, the title to an easement acquired thereunder now depends entirely on positive enactment; and is no longer to be rested on the fiction of a presumed grant or licence from the adjoining proprietor (*r*). The enjoyment of the right must be for the whole statutory period in the character of an easement, as distinct from the land on which it is sought to be imposed (*s*); and, except in the case of an easement of

(*p*) *Salkeld v. Johnston*, 1 Mac. & G. 242; see *Dean of Ely v. Bliss*, 2 De G. M. & G. 469

(*q*) Compare the Real Property Limitation Act, 33 & 34 Vict. c. 57, sect. 6.

(*r*) See Lord Westbury's judgment in *Topley v. Jones*, 11 H. L. Ca. 290.

(*s*) *Harbridge v. Warwick*, 3 Ex. 552; and see and consider *Ladyman v. Grace*, L. R. 6 Ch. Ap. 763.

necessity, the right, if acquired, is extinguished by an union of the ownership of the dominant and servient tenements, for estates of an equally high and perdurable nature (*t*); though it is only suspended, where the estates are not of the same duration; and will revive on their severance (*u*). The Act is retrospective in its operation, so as to include in the computation of the times necessary to confer the statutory title, a period of enjoyment prior to the passing of the Act (*x*): but each of the respective periods must be deemed and taken to be the period next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought in question (*y*).

A claim to light becomes absolute and indefeasible after twenty years' uninterrupted enjoyment; unless such enjoyment be shown to have been by virtue of some consent or agreement, expressly made or given for that purpose by deed or writing (*z*); and local customs to the contrary are expressly rendered inoperative (*a*). The enjoyment need not be as of right; nor, as respects this easement, is there any reservation of the rights of reversioners (*b*); and, so as there be no adverse interruption, an unbroken continuity of enjoyment of the easement is not necessary to establish the right; thus, if after the statutory period has commenced to run, but before the twenty years have elapsed, there is an interval during which the owner of the dominant tenement, or his occupying tenant, is also in the occupation of the servient tenement, the operation of the statute is for the time suspended, but revives on the severance of the unity of occupation; and the statutory period may be made up partly of the period immediately prior to the unity of

As to claims
of light.

(*t*) See Co. Litt. 313 a; *Thomas v. Thomas*, 2 C. M. & R. 41; *Simper v. Foley*, *infra*.

(*u*) *Simper v. Foley*, 2 J. & H. 555, and cases there cited.

(*a*) *Simper v. Foley*, *ubi supra*.

(*y*) Sect. 4.

(*z*) Sect. 3.

(*a*) *Salter's Ob. v. Jay*, 3 Q. B. 109; *Truscott v. The Merchant Tailors' Co.*, 11 Ex. 855; and see *Yates v. Jack*, L. R. 1 Ch. Ap. 295; *The Curriers' Co. v. Corbett*, 3 Drew. & Sma. 855; *Heath v. Bucknall*, L. R. 3 Eq. 1.

(*b*) Sect. 8.

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"occupation and partly out of the period immediately succeeding it (c). Where it is acquired against the owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion (d).

Whether
right lost by
enlargement
or alteration
of ancient
windows.

In order to establish the right there must, it is conceived, be some *building* in respect of which it can be claimed (e); but when once acquired, it will not be lost by an enlargement or alteration of the ancient windows (f); nor by the destruction of the dominant tenement, whether by some casualty, or by the voluntary act of its owner, unless there is evidence of an intention to abandon the right; as, e.g., by not rebuilding the house within a reasonable period (g); nor, on rebuilding, is it absolutely necessary that the new windows should be identical in situation or dimensions with those which previously existed, if there is no material change in the nature or in the *quantum* of the servitude imposed (h); nor does the fact that the owner of the dominant tenement has within the statutory period acquired by the removal of buildings a larger quantity of light than he previously had, entitle the owner of the servient tenement to obstruct the excess of light (i). It has been held that where the owner of ancient lights has replaced them by larger windows, the Court will not restrain the owner of the servient tenement from obstructing them, but will leave the plaintiff to his remedy at Law (k); but, in later cases, this decision has been disapproved; and it appears to be now well settled that the mere fact that an owner of ancient

(c) *Ladyman v. Grare*, L. R. 6 Ch. Ap. 763.

(d) *Simper v. Foley*, 2 J. & H. 555.

(e) See *Roberts v. Macord*, 1 Moo. & Rob. 230; where, however, it was not necessary to decide the point.

(f) *Jones v. Taping*, 12 C. B. N. S. 343; *Taping v. Jones*, 11 H. L. Ca. 320, overruling *Renshaw v. Bean*, 18 Q. B. 312; and *Hutchinson v. Copeland*, 9 C. B. N. S. 343.

(g) *Moore v. Rawson*, 3 H. & C. 337, 341.

(h) *The Carriers' Co. v. Corbett*, 2 Drew. & Sma. 368; but see *Cherrington v. Abney*, 2 Vern. 646; and *Aynsley v. Glover*, *ubi infra*.

(i) *Dyers' Company v. King*, L. R. 9 Eq. 438; but would not the right to obstruct in such a case depend on whether the owner of the dominant tenement had sufficient light for the comfortable enjoyment of his house? *Vide infra*.

(k) *Heath v. Bucknell*, L. R. 8 Ex. 1.

lights has enlarged them, does not disentitle him to an injunction to restrain the servient owner from obstructing them (l). According to this doctrine, which is the logical consequence of holding that an alteration is not *per se* an abandonment of the easement, if the owner of a small ancient light convert it into a large window, which cannot be obstructed without blocking the access of light, previously enjoyed, through the space or aperture of the old window, he will after the lapse of the statutory period acquire, in respect of the enlarged window, the prescriptive right which he originally had only in respect of the smaller one; and will in the meantime be able to prevent any obstruction, on the part of the owner of the servient tenement, which may interfere with the acquisition of the right.

In the present conflict of the authorities it is very difficult to lay down any definite rule as to the extent to which the enjoyment of this easement can be claimed; but it seems to be the better opinion that the extent of the right is the same whether the dominant tenement in respect of which it is claimed be situate in a town or in the country (m); and that the right extends not only to light sufficient for the use to which the tenement is for the time being applied, but also to light sufficient for any purposes for which it may reasonably be used (n).

As to the extent to which the right may be claimed.

It seems to be now well settled that the Act, although it has altered the mode in which the right may be acquired, has not altered or extended the right itself; and that, as

As to the quantity of light.

(l) *Aynsley v. Glover*, L. R. 18 Eq. 544; and see *Staight v. Burn*, L. R. 5 Ch. Ap. 163, 167.

(m) *Yates v. Jack*, L. R. 1 Ch. Ap. 299; *Dent v. Auction Mart Co.*, L. R. 2 Eq. 248; *Lyon v. Dillimore*, 14 W. R. 511; *Martin v. Headon*, L. R. 2 Eq. 430; and see *contra*, *Clarke v. Clark*, L. R. 1 Ch. Ap. 16; *Durall v. Pritchard*, *ibid.* 251; *Robson v. Whittingham*, 35 L. J. N. S. Ch. 223; and

see observations of L. J. James on *Clarke v. Clark* in *Kell v. Pearson*, L. R. 6 Ch. Ap. 809, see p. 812.

(n) *Yates v. Jack*, and *Dent v. Auction Mart Co.*, *ubi supra*; but see *Jackson v. Duke of Newcastle*, 33 L. J. N. S. Ch. 698; 3 De G. J. & S. 275, and see comments on this case in *Aynsley v. Glover*, L. R. 18 Eq. 544, where Sir George Jessel, M. R., treats it as overruled by *Yates v. Jack*.

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before the Act, the owner of the dominant tenement was only entitled to such a quantity of light as was sufficient, according to ordinary usage, for the comfortable and beneficial enjoyment of his house or shop, so, since the Act, he can only acquire by prescription a right to a *sufficient* quantity of light; not necessarily a right to all the light which he has enjoyed during the statutory period (o).

On sale of one of two adjoining tenements by the owner of both.

In the case of *Suffield v. Brown* (p), Lord Westbury laid it down that upon the disposition of one of two adjoining tenements by the owner of both, where the grant is unlimited in terms, there is no implied reservation or re-grant, in favour of the tenement retained, of a quasi-easement then enjoyed therewith; even though such quasi-easement be continuous or apparent: and in a later case (q) it was considered to be well settled that if a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may (unless restrained by the terms of his grant,) erect any buildings he pleases upon the land so sold to him, however much they may interfere with the lights of the vendor's house (r). In his judgment in *Suffield v. Brown*, Lord Westbury carefully confined his remarks to cases where the easement had no legal existence anterior to the unity of possession, but was claimed, merely as arising by implication upon the disposition of one of two adjoining tenements by the owner of both; but the principle of the decision,—i.e., the rule that a grantor shall not derogate from his absolute grant,—seems equally applicable to the case of an easement which has been legally acquired before the dominant and servient tenements became united in the same owner (s). In every such case a prudent vendor will,

(o) See and consider *Kirk v. Pearson*, L. R. 6 Ch. Ap. 809.

(p) 33 L. J. N. S. Ch. 249; overruling *Pyer v. Carter*, 1 H. & N. 916; *Hinchliffe v. Earl of Kinnoull*, 5 Bing. N. C. 1. But see *Watts v. Kelso*, L. R. 4 Ch. Ap. 166, 171, where *Pyer v. Carter* is expressly approved

by the Lords Justices notwithstanding Lord Westbury's strictures upon it in *Suffield v. Brown*.

(q) *The Carriers' Co. v. Corbett*, 2 Drew. & Sim. 355.

(r) Per V. C. Kindersley, in *The Carriers' Co. v. Corbett*, *ubi supra*.

(s) *Vide supra*, p. 357.

by express reservation or re-grant, keep on foot for his own benefit, in respect of the tenement retained, any easement or quasi-easement which he may have acquired or enjoyed, or which he may desire to exercise, over the tenement sold.

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Claims of right of way, water, watercourse, or any other easement (except light) become *prima facie* valid after twenty years' uninterrupted enjoyment; and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but, until forty years' uninterrupted enjoyment they remain liable to be defeated in any other way in which they might have been defeated before the passing of the Act; *e.g.*, "by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised" (f): after forty years' uninterrupted enjoyment, they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly given or made for that purpose by deed or writing (u): after the end of the twenty years, and before the end of the forty, a grant may still be presumed by a jury (x), notwithstanding that the enjoyment is shown to have originated in an agreement by parol or writing not under seal (y): but no such presumption is admissible if the owner of the servient tenement was incapable of rightfully granting the easement: *e.g.*, if such grant would have been a breach of trust (z).

As to easements other than light.

Some of the main points in the law as to rights of way may be here conveniently referred to. A road may be a common highway, even though it is only occasionally used by the public, or is circuitous, or does not terminate in a

As to rights of way:

(f) Per *Parker, B.*, 1 C. M. & R. 219.

(u) Sect. 2.

(z) See 1 C. M. & R. 222.

(y) *Deakins v. Wrigley*, 1 C. P. Coop. 329.

(z) *Rockdale C. Co. v. Radcliffe*, 18 Q. B. 287.

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public way ;

town, or in some other public road (a) ; and a very short continuous user of it by the public, openly and as of right, is sufficient to raise a presumption of its dedication to their use (b) : but the presumption may be rebutted by evidence of the owner's intention that the public should only have a permissive user, as, *eg.*, by his arbitrarily closing the way for one day in each year (c) ; or by showing that the state of the title was such that a binding dedication was impossible (d) ; but mere non-user for any number of years will not destroy (e), or prevent the public from resuming (f), the right to a public way ; though it may be evidence that no such right ever existed. The soil of a road, whether public or private, *usque ad medium filum viæ*, is presumed to belong to the adjoining owners (g) : and passes by the conveyance, even where the land is set forth by admeasurement, and is described by reference to a plan which contains no portion of the highway (h).

private way ;

A right of private way is generally claimed by express grant or reservation ; but such a grant has been presumed from an uninterrupted enjoyment of twenty years not shown to be merely permissive (i), and the presumption may be raised, even where the land is in the occupation of a tenant, if the user has been of long duration, or there are other circumstances which prove that such user was with the knowledge of the owner of the inheritance (k).

way of necessity.

A right of way, by necessity, may be claimed, as arising from an implied grant, on the principle that a convenient way is impliedly granted as a necessary incident to the land

(a) *Rea v. Inhabitants of Wandsworth*, 1 B. & Ald. 63.

(b) *Rugby Charity v. Merryweather*, 11 East, 276 ; where a period of six years was held sufficient.

(c) *The Trustees of the British Museum v. Finnis*, 5 Car. & Payne, 400.

(d) *Reg. v. Parnley*, 4 K. & Bl. 787.

(e) *Dalton v. Hawkins*, 3 C. B. N.

S. 848.

(f) *Rea v. Montague*, 4 B. & C. 508.

(g) *Berridge v. Ward*, 7 Jur. N. S. 876 ; *Holmes v. Dillingham*, 7 C. B. N. S. 329.

(h) *Berridge v. Ward*, *ubi supra*.

(i) *Campbell v. Wilson*, 3 East, 294.

(k) *Davis v. Stephens*, 7 Carr. & P. 570 ; *David v. North*, 11 East, 872.

conveyed (l); but nothing short of absolute necessity for the user of the way at the date of the grant is sufficient to raise the implication (m); and the right is limited by, and ceases with, the necessity which created it (n).

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It is for the grantor to determine what is a convenient way to the land-locked land; but when, once the way has been created, it seems the better opinion that the owner of the servient tenement cannot divert it at his pleasure, even though the substituted way may be as convenient (o). Where on a devise a farm was severed, and there was no access to one of the severed portions, except over the other, and the will was silent as to any right of way, it was held that there was an implied grant of a right of way which actually existed at the death of the testator, who had himself occupied the farm (p).

By whom to
be determined.

A private right of way is not necessarily lost by twenty years' non-user, the party entitled having had a more convenient mode of access; in order that non-user may have the effect of destroying the right, it must be the consequence of something which is adverse to the user (q); and a parol agreement for the substitution of a new way has been held no evidence of the abandonment of an old prescriptive way (r). A right of way by prescription must be restricted to the kind of user to which the prescription extends; where it depends upon grant it may be lost by the user of it for purposes not authorized by the terms of the grant (s); but unless specially restricted, it will, as a general rule, be construed as a right of way for all purposes. Thus, where a

How right of
private way
may be lost.

(l) *Proctor v. Hodgson*, 10 Exch. 824, 828; *Pennington v. Galland*, 9 Exch. 1; 22 L. J. Ex. 349.

(m) *Dodd v. Birchall*, 8 Jur. N. S. 1180; 31 L. J. Ex. 364.

(n) *Holme v. Goring*, 2 Bing. 76.

(o) See dicta of Blackburn, J., in *Pearson v. Spencer*, 7 Jur. N. S. 1195; 1 Best & S. 584.

(p) *Pearson v. Spencer*, *ante* *supra*.

(q) *Ward v. Ward*, 7 Exch. 838; 21 Law J. Exch. 334.

(r) *Lovell v. Smith*, 3 C. B. N. S. 120, 126, 127.

(s) *Allan v. Gomme*, 11 Ad. & Ell. 759; and see *Henning v. Burnet*, 8 Exch. 192; but see *United Land Co. v. G. E. R. Co.*, L. R., 17 Eq. 158, 162.

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right of way was granted to A. through a gateway belonging to the vendor "to a wicket gate to be erected by A.," leading into part of the property conveyed to him, and A., instead of building a wicket gate, erected a cart shed, and claimed a right of carriage way to it, it was held that no restriction could be implied from the terms of the grant, and that the purchaser was entitled to a right of way for all purposes (t).

As to water
 and water-
 courses.

The law as to water and watercourses seems in its principal points to be as follows:—Every riparian proprietor has a *prima facie* right to fish the stream in front of his own land (u); and to use it for his own purposes, in any manner not inconsistent with the exercise of a similar right by the proprietors of land above or below; but he can neither as against those below injure the quality of the water, nor sensibly diminish its quantity, nor as against those above can he dam up the water to their inconvenience (x); and an action will lie for diverting the water, even without proof of specific injury (y). The right to divert and use the stream for the purpose of irrigation, is a question of degree, which cannot be precisely defined; but depends upon the application of the above general principles to the particular case (z). Where the right to a certain flow of water has been acquired, it will not, it seems, be lost by the application of the water to a new and more beneficial use (a).

No right to
 flowing water,

but the right to flowing water *ex jure naturæ* only pre-

(t) *Watts v. Kelown*, L. R. 6 Ch. Ap. 166; see note, p. 169; and see *United Land Co. v. G. E. R. Co.*, L. R. 17 Eq. 158.

(u) *Limb v. Newbiggin*, 1 Car. & K. 549. As to who is a riparian owner, and as to the power of a riparian owner to grant to a non-riparian owner the use of the watercourse, see *Nuttall v. Brucewell*, L. R., 2 Ex. 1.

(x) See *Wright v. Howard*, 1 Sim. & St. 180; *Mason v. Hill*, 2 B. & Ad. 1; *Acton v. Blundell*, 2 M. & W. 349; *Wood v. Wand*, 3 Rich. 746; *Embrey v. Owen*, 6 Exch. 358; *Rawston v.*

Taylor, 11 Exch. 369.

(y) *Harrop v. Hirst*, L. R. 4 C. P. 43; but vide *infra*.

(z) See *Wood v. Wand*; *Embrey v. Owen*, *ubi supra*; *Att.-Gen. v. Corp. of Plymouth*, 9 Beav. 67; *Elmhirst v. Spencer*, 2 Mac. & G. 45; *Sampson v. Hoddinott*, 3 Jur. N. S. 243.

(a) See *Holker v. Porritt*, L. R. 8, Exch. 107; affirmed by the Exchequer Chamber, 6 Feb. 1875; and see *Watts v. Kelown*, L. R. 6 Ch. Ap. 166. As to who is a riparian owner, see *Holker v. Porritt*, *ubi supra*.

vails where it has a defined course; and does not extend to water flowing over, or soaking through, permeable land, before it has found its way into a definite channel (*b*). If the existence of a subterraneous watercourse be a matter of notoriety, the landowner's rights are the same as if it were superficial (*c*); thus, where there was a natural drainage by means of "swallets," (*i.e.*, funnel-shaped fissures in the rock forming the Mendip Hills,) and the waters running through them found an outlet at the base of the hills, a mine-owner was restrained from fouling the surface water, to the injury of the owner of an ancient mill who had long enjoyed the water in an unpolluted state (*d*). But the principles which regulate the rights of owners of land in respect of water flowing in a certain defined course, whether in an open stream, or by a known subterraneous channel, are wholly inapplicable to water percolating through underground strata without any definite course (*e*); thus, it has been held that the owner of an ancient mill could not maintain an action against a landowner, who, by sinking a deep well on his own ground, had intercepted the water which would have otherwise percolated through the soil into a river which supplied the motive power to the mill (*f*): but where water from a spring flows in a natural channel, the landowner cannot cut off the spring at its source, to the injury of a riparian proprietor lower down the stream (*g*); and he may not use his right to water percolating through underground strata, so as to draw off the water flowing in a defined channel on his neighbour's land (*h*).

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except where
it has a
definite
channel.

A right to use a natural stream for the purpose of washing

Prescriptive
right to foul a
stream.

(*b*) *Broadbent v. Rambotham*, 11 Exch. 602; and see *Rawstron v. Taylor*, *ibid.* 369, 382.

(*c*) *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 300, 301; but see *Chasemore v. Richards*, 7 H. L. Ca. 349; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. Ap. 483.

(*d*) *Hodgkinson v. Ennor*, 9 Jur. N. S. 1152.

(*e*) *Chasemore v. Richards*, 7 H. L. Ca. 349; 2 H. & N. 168; and see *Acton v. Blundell*, 12 M. & W. 324.

(*f*) *Chasemore v. Richards*, *ubi supra*, questioning *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 300.

(*g*) *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627.

(*h*) *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. Ap. 483.

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ore; and carrying off the sand, stone, and rubble dislodged in the necessary working of a mine, may be acquired by custom or prescription (i); but where a prescriptive right to foul a stream has been acquired, the fouling must not be enlarged to the prejudice of the other riparian proprietors (k); nor so as to increase the pollution by a novel mode of user (l). The mere suspension of the exercise of the prescriptive right is not sufficient to destroy it, unless there is some evidence of an intention to abandon it; but where dye-works had been disused for more than twenty years, the right of fouling the stream which attached thereto was held to be lost (m).

Distinction between natural and artificial watercourses as respects the rights which may be acquired.

The same rules which regulate the rights of user of a natural stream, apply also, in general, to an artificial watercourse, but with this modification, *viz.*, that in determining what rights can be acquired in respect of an artificial watercourse, the special or temporary purpose for which it was originally constructed, and has since been used, must not be overlooked (n). Thus, a user for twenty years of the flow of water from the agricultural drainage of adjoining land gives no right to its continuance (o); so, no prescriptive right by user can be acquired to the overflow of water from a lock, so as to prevent a canal company from improving the construction of the lock (p); so, a person receiving water discharged from a mine cannot insist on a continuance of such discharge (q); so, the flow of water for twenty years from

(i) *Carlton v. Loring*, 1 H. & N. 784; 26 L. J. Exch. 251.

(k) *Cressley v. Lightowler*, L. R. 2 Ch. Ap. 478; L. R., 3 Eq. 279.

(l) *Baxendale v. McMurray*, L. R. 2 Ch. Ap. 790.

(m) *Cressley v. Lightowler*, *ubi supra*, and see also as to suspension of the easement, *Ladyman v. Grave*, L. R. 6 Ch. Ap. 763; and as to long-continued interruption from natural causes, see *Hall v. Swift*, 4 B. N. C. 367; and as to the right to pollute streams or rivers, see *Goldsmid v. Tinsley*, 11 W. R. 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

L. R. 1 Ch. Ap. 349; *Att-Gen. v. Mayor, &c., of Leeds*, L. R. 5 Ch. Ap. 583.

(n) *Mager v. Chadwick*, 11 Ad. & E. 571; *Sutcliffe v. Booth*, 33 L. J. Q. B. 136; 9 Jur. N. S. 1037; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Beeston v. Heale*, 2 Jur. N. S. 543.

(o) *Gratwicke v. Hayward*, 8 Exch. 291; *Wood v. Wand*, 3 Exch. 748.

(p) *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Co.* L. R. 1 E. & In. Ap. 354.

(q) *Arbuthnot v. Giff*, 5 M. & W. 203.

the eaves of a house into a neighbour's yard, does not prevent the owner of the house from pulling it down, or altering it so as to discontinue or lessen the supply of water from the roof (r).

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The waters of a canal, having been devoted by the Legislature to that special purpose, are, as respects the power of adjoining owners to acquire a right over them, on a different footing from waters flowing in their natural stream, or in an ordinary artificial watercourse; and the general rule that the purpose for which artificial waters have been collected must be regarded in determining whether any prescriptive rights have been acquired over them, applies with especial force to the waters of canals (s).

As to canals.

A right to pump water from a mine, and to use it, and then let it off over adjoining land, has been held to be a right of "watercourse" within the Act (t); so, a right to discharge rain-water from the roof of a house upon adjoining land may be acquired by twenty years' user (u). We may here remark that a reservation of "water and soil" has been held to mean only water in its natural condition, and such matters as are the result of the ordinary use of land for purposes of habitation, and not to include refuse from a manufactory (x).

As to right to
pump water
from a mine
and use it.

The bed of all tidal navigable rivers, and of all arms of the sea, presumably belongs to the Crown; but primarily for the benefit of the subjects: and the public right of navigation is paramount to the private right even of an express grantee of the soil (y). As between the Crown, or

As to owner-
ship of soil of
watercourse.

(r) *Wood v. Wand*, 3 Exch. 748; 77.

Arkwright v. Gell, *ubi supra*.

(u) *Thomas v. Thomas*, 2 Cr. M. & R. 34.

(s) *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Co.*, 11 Jur. N. S. 71; L. R. 1 E. & Ir. Ap. 254; and see and consider *Mason v. Shrewsbury and Hereford R. Co.*, L. R. 6 Q. B. 578.

(x) *Chadwick v. Marsden*, L. R. 2 Exch. 285.

(y) *Gann v. Free Fishers of Whitstable*, 11 H. L. Ca. 192. See, too, *Malcolmsen v. O'Dea*, 10 H. L. Ca. 593.

(t) *Wright v. Williams*, 1 M. & W.

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the Crown's grantee and a seaside landowner, the right of the former is presumably limited by the line of medium high-tide, between the springs and the neaps (*z*). Where a river is not navigable, the presumption is that each riparian proprietor is entitled to the soil *usque ad medium aquæ* (*a*); being similar to the presumption which exists in regard to roads (*b*). No riparian proprietor can, without the consent of the opposite proprietor, erect any building, or groin, or make any change in the alveus of a river (*c*); and the rule is the same in the case of a tidal as of a non-tidal stream (*d*).

As to the
right of lateral
support.

Every landowner, independently of prescription, and as an original right incident to property, is entitled to so much lateral support from his neighbour's land, as is necessary to keep his soil in its natural state (*e*); but he has no *prima facie* right to overburden his own land by buildings, and then to require an extraordinary amount of support by his neighbour's land (*f*). If however his buildings, although of recent erection, do not contribute to the subsidence—that is to say, if the facts show that the subsidence would have occurred even if the buildings had not been erected,—he is entitled to full damages in case of their being destroyed or injured by subsidence caused by subterraneous workings

How the right
may be
acquired.

under the adjoining land (*g*). The right to extraordinary support is an easement coming within the provisions of the Act; and if not acquired by grant or reservation, can be acquired only by forty years' uninterrupted enjoyment (*h*). But the grant of such an easement may be implied; for a

(*z*) *Att.-Gen. v. Chambers*, 4 De G. M. & G. 206. As to the title to lands gained from the sea, either by alluvion or dereliction, and either by natural or artificial causes, see *Att.-Gen. v. Chambers*, 4 De G. & Jo. 55.

(*a*) *Winkart v. Wylie*, 2 St. Sc. Ca. H. L. 68.

(*b*) *Reg. v. Pratt*, 3 C. L. R. 686.

(*c*) *Bickett v. Morris*, L. R. 1 H. L. 47.

(*d*) *Att.-Gen. v. Earl of Londale*, L. R. 7 Eq. 377.

(*e*) *Hunt v. Peak*, Johns. 705; *Ronbotham v. Wilson*, 8 El. & Bl. 123.

(*f*) *Harris v. Ryding*, 5 M. & W. 60; *Humphries v. Brogden*, 12 Q. B. 739; *Jeffries v. Williams*, 5 Exch. 792; *Smart v. Morton*, 3 C. L. R. 1004.

(*g*) *Brown v. Robins*, 4 Hurl. & R. 186; *Stroyan or Hamer v. Knowles*, 6 Hurl. & R. 454.

(*h*) *Nicholls v. Gayford*, 9 Exch. 702; see and consider *Solomon v. Vintners' Co.*, 5 Jur. N. S. 1177.

vendor on selling part of his land, is presumed to grant such a measure of support from his adjacent land as is necessary for the land sold in its then condition, or when applied to the purpose for which the grant was expressly made: but the precise measure of such support depends upon the special circumstances of each case (i). So, where houses are built on land belonging to the same owner, and are then sold to different purchasers, or some are sold and others retained by the landowner, the right to mutual support will be presumed, by way of reservation or grant in the several conveyances (k): but where two adjoining plots, or houses belonging to the same owner, are sold at different times, the measure of support, to which the second purchaser is entitled, depends on the terms of the contract entered into with the first (l).

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When the right of support is interfered with by the withdrawal from the adjoining land of the necessary supporting strata, no right of action accrues until some actual damage has resulted from the withdrawal of the support (m); and the damage must be appreciable (n): but if the party withdrawing the support insists that he has a right to do so, without being liable for any damage resulting therefrom, he may, it seems, be restrained by injunction, although no actual mischief has occurred (o).

When right of action accrues for withdrawal of support.

(i) *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Ca. 449; 2 Jur. N. S. 623; *Rowbotham v. Wilson*, 2 Jur. N. S. 736; 4 Ell. & Bl. 593; 8 Ell. & Bl. 123; 8 H. L. Ca. 343; 8 Jur. N. S. 965; *Roberts v. Haines*, 2 Jur. N. S. 999; 6 Ell. & Bl. 643; *Haines v. Roberts*, 7 Ell. & Bl. 625; *Caledonian R. Co. v. Leith Dalhousie*, 3 Jur. N. S. 573; *Bonomi v. Backhouse*, 5 Jur. N. S. 1343; 9 H. L. Ca. 503; 7 Jur. N. S. 909; *Smith v. Darby*, L. R. 7 Q. B. 716.

(k) *Richards v. Bell*, 2 Black 313; *Nicholls v. Gaggard*, 3 K. 703.

(l) *Murchie v. Black*, 11 Jur. N. S.

608.

(m) *Bonomi v. Backhouse*, *ubi supra*, overruling *Nicklin v. Williams*, 10 Exch. 259: see, too, *North Eastern R. Co. v. Elliott*, 1 J. & H. 145; 2 De G. F. & Jo. 423; 10 H. L. Ca. 333. But see *Harrop v. Hurst*, L. R. 4 Ex. 43, case of abstraction by riparian owner, where the right of action was held to have accrued, although no actual damage had been sustained.

(n) *Smith v. Thacker*, L. R. 1 Q. B. 564.

(o) *North Eastern R. Co. v. Elliott*, *ubi supra*.

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Right of sur-
face owner to
support where
minerals and
the right to
work them are
reserved.

A resignation or grant of minerals, with power to work them, does not, in the absence of express stipulation, deprive the surface owner of his natural right to the support of the subjacent strata; the presumption being that he retains the right to enjoy the surface *modo et forma* as it was before (p); even though it may be impossible to work the mines without causing a subsidence or an absolute destruction of the surface (q); and the right of support which a surface owner is presumed to retain for himself on a sale of minerals, belongs equally to an allottee under an inclosure, where the minerals and the right to work them are reserved to the lord of the manor (r): but the ordinary presumption is rebutted when the Inclosure Act or deed of grant contains a provision for compensation being paid by the lord of the manor or the grantee in case of injury being occasioned by his exercising his powers (s). And where A., by draining his land, causes a subsidence of the land of B., an adjoining owner, he is not liable for the injury thus occasioned; the Common Law doctrine as to the right to support not extending to subterranean water (t).

Minerals are
reserved by
implication on
sales by
colonisation
corporations
for redeeming
land tax.

We may here remark that the Land Tax Redemption Acts, in authorizing sales of lands belonging to ecclesiastical corporations, for the purpose of redeeming the Land Tax charged on their other lands, provide for an implied reservation of the minerals. It is believed that the point is not unfrequently overlooked in practice.

A superior
stratum may

The absolute owner of a mineral stratum, whether under

(p) *Dugdale v. Robertson*, 3 K. & J. 695; *Royers v. Taylor*, 2 H. & N. 828; *Harris v. Ryding*, and *Smart v. Morton*, *ubi supra*; and see *Rosbottom v. Wilson*, *ubi supra*, where there was an express stipulation; *Beckett v. Darby*, L. R. 7 Q. B. 716.

(q) *Walsfield v. Duke of Buccleuch*, L. R. 4 Eq. 618; and cases there cited; *How v. Gilk*, L. R. 7 Ch. Ap. 699; and of this clay which could

not be worked without destroying the surface.

(r) *Roberts v. Helms*, 2 Jur. N. S. 999; 5 El. & Bl. 648; *Walsfield v. Duke of Buccleuch*, *ubi supra*.

(s) *Duke of Buccleuch v. Walsfield*, L. R. 4 Eq. & 12 Ap. 877; *How v. Gilk*, *supra*.

(t) *How v. Gilk*, *supra*; *How v. Gilk*, L. R. 7 Ch. Ap. 699.

a grant or a reservation, is entitled to use it for any purpose he thinks fit, not inconsistent with the rights of the owner of the surface, *e.g.*, as a means of access to adjoining mineral property (u).

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... be used for all purposes.

By the 77th section of the Railways Clauses Consolidation Act, a railway company are not to be entitled to any mines of coal, ironstone, slate, or other minerals, under any lands purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased: but they may always secure sufficient support by the purchase of the subjacent minerals; and may delay such purchase until the necessity for it arises. If, however, the company decline to purchase, the mine-owner may work the minerals in a proper manner according to the custom of the district; and the company cannot, under their statutory purchase, claim the benefit which an ordinary purchaser would have had to the subjacent and adjacent support (x). So, a statutory power to construct a sewer does not imply the ordinary right to the necessary lateral support; in such a case, the easement must be acquired by purchase (y).

A railway company not entitled to minerals except by express purchase.

Claims of rights of common and other profits *à prendre*, become *prima facie* valid after thirty years' uninterrupted enjoyment (z); and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but until sixty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been

Claims of rights of common and profits *à prendre*.

(u) *Proud v. Bates*, L. T. 34 N. S. p. 406; *Duke of Hamilton v. Graham*, L. R. 2 Sc. & D. Ap. 166.

(x) *G. W. R. Co. v. Bennett*, L. R. 2 E. & Ir. Ap. 27; *Fletcher v. G. W. R. Co.*, 4 H. & N. 242; *affd.* 5 H. & N. 689; and see *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Co. 419, a case before the Railways C. C. Act; *Dudley Canal Co. v. Grazebrook*, 1 B. & Ad. 59.

(y) *Metrop. Board of Works v. Metrop. R. Co.*, L. R. 3 C. P. 612; *affd.* L. R. 4 C. P. 192; and see 18 & 19 Vict. c. 120, ss. 135, 150, 151; and 11 & 12 Vict. c. 112, ss. 33, 66.

(z) See *Bailey v. Appleyard*, 8 Ad. & E. 161. See 778. The title acquired by user can be merely co-extensive with the user, *Davies v. Williams*, 16 Q. B. 546.

Claim of right
of fishing, &c. defeated before the passing of the Act. After sixty years' uninterrupted enjoyment, they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly made or given for that purpose by deed or writing (a). But a claim to a right of common, &c., may be defeated after thirty years' enjoyment by showing that it could not have had a legal origin (b); and it would seem that the Act does not apply to any case where the establishment of a right by means of it would be a violation of the express terms of statutes prohibiting the granting of such a right (c): nor where the claim is one which cannot be lawfully made by custom, prescription, or presumed grant (d).

Claim of right
of fishing, &c.

A right to hawk or fish, implies a right to carry away the game or fish, and is therefore a right of profit *à prendre* (e); and even a right to angle for amusement, leaving the fish on the shore for the landowner, has been held to be of the same nature (f) so, also a right to shoot. But the mere right to hunt, that is, to follow in the pursuit of game over land, does not of itself import the right to the animal when taken; and, if confined to the individual claimant, would seem to be attributable to a mere personal licence of pleasure: but where the right is exercisable by the claimant or his assigns "along with servants," it is considered to involve a right to carry off the game (g).

Right to dig
coal, &c.

A right to dig coal or other minerals on another man's land is a right to a profit *à prendre*, and, if reasonable and certain, may be claimed by prescription (h); though not by

(a) Sect. 1. *Welcome v. Upton*, 5 M. & W. 398.

(b) *Mill v. New Forest Commissioners*, 18 C. B. 60; 2 Jur. N. S. 528.

(c) *Mill v. New Forest Commissioners*, 18 C. B. 60; 2 Jur. N. S. 528.

(d) *Upton v. Gifford*, 5 Q. B. 615; *Upton v. Matthews*, 4 K. & J. 579.

(e) *Wickham v. Hawker*, 7 M. & W. 63; *Kearse v. Graham*, 7 H. L. C. 331.

(f) *Bland v. Lymington*, 3 C. L. R. 361.

(g) See *Wickham v. Hawker*, and *Kearse v. Graham*, *supra*.

(h) *Wickham v. Hawker*, 3 M. & W. 303.

custom (i) : but a claim to dig and carry away the soil from another's land, without stint or limit, cannot be established by prescription (k). Chap. VIII.
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Whether the right to the *sole and several* herbage and pasturage of land is within the Act seems doubtful (l) ; but the right to take, *along with others*, any of the produce of land, e.g., grass, turves, or trees—or of the soil itself, e.g., sand, clay, or stones—is a right of profit *à prendre* ; which, within reasonable limits, may be claimed by prescription. The right to enter and draw water from a natural spring is, however, an easement, and not a profit *à prendre* ; running water being no part of the soil, nor the produce of the soil (m). Right of sole
pasturage.

From what has been previously said, it would appear that the period for which a vendor, in order to show a title under the Act, must prove uninterrupted enjoyment, is as follows : viz., twenty years in the case of lights ; forty years in the case of ways, waters, watercourses, and other easements (except lights) ; and sixty years in the case of rights of common and other profits *à prendre* : but, in the second class of cases, where the land or water which is sought to be affected by the easement has, during the period of enjoyment, been held for life, or for any term exceeding three years, the reversioner, notwithstanding the expiration of the forty years, has a period of three years from the determination of the particular estate in which to resist the claim (n) ; so that unless (as can seldom be the case,) the vendor can show the title to the land or water, he cannot, by evidence of enjoy- Period for
which pos-
session must
be proved in
evidence of
title.

(i) *Att.-Gen. v. Mathias*, 4 K. & Jo. 579, 591 ; but see *Rogers v. Brenton*, 10 Q. B. 26.

(k) *Clayton v. Corby*, 5 Q. B. 415 ; *Att.-Gen. v. Mathias*, *supra*. As to stone being a "mineral," see *Derrill v. Roper*, 8 Dru. 294 ; and *Bell v. Wilson*, L. R. 1 Ch. Ap. 393, 5 Dru. & Sm. 296 ; and cases cited in judgments. See too *Hent v. Gill*, L. R.

7 Ch. Ap. 699 as to what is included in the term "minerals."

(l) See *Welsh v. Upton*, 5 M. & W. 398, 403 ; 6 M. & W. 536, 542.

(m) *Race v. Ward*, 4 Eil. & Bl. 702 ; 1 Jur. N. S. 704.

(n) Sect. 8. See *Palk v. Skinner*, 17 Jur. 372 ; 10 Q. B. 568.

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ment, make a good title to the easement (o): and enjoyment which gives no title as against the reversioner, gives no title as against the owner of the particular estate (p): and it must be observed that, as regards the *prima facie* title which is gained by a thirty or twenty years' possession under the first and second sections of the Act, the time during which there may have been any disability, or a subsisting life estate, is altogether excluded by the seventh section. But as respects the easement of light, the Statute contains no reservation of the rights of the reversioner (q).

Enjoyment
must have
been un-
interrupted
and as of
right.

In all the above cases (except that of a claim to light), the enjoyment must have been uninterrupted (r), "as of right" (s); and must have been subsisting within, at most, a year before the commencement of the action in which it is relied on (t): the claim therefore may be defeated by showing that, for the whole or a part of the period relied on, the enjoyment was by parol licence; or was exercised by stealth, or without the knowledge of the parties interested in opposing the claim (u), or that the party exercising it was himself, during all or any part of such period, entitled to the possession of the property sought to be affected (x). In cases falling under sections 1, 4, and 7 of the Act, an enjoyment, as of right, may be proved, by showing enjoyment for several periods, amounting together to the statutory time; and that, during the entire intervals between such periods,

(o) *Bright v. Walker*, 1 C. M. & R. 219.

(p) S. C. 221.

(q) *Vide supra*.

(r) *Onley v. Gardiner*, 4 M. & W. 500.

(s) See *Beeton v. Weate*, 5 El. & Bl. 986.

(t) See *Parker v. Mitchell*, 11 Ad. & E. 798; *Flight v. Thomas*, 8 Cl. & F. 231; *Low v. Carpenter*, 6 Exch. 525.

(u) See *Bright v. Walker*, 1 C. M. & R. 219; *Tickle v. Dixon*, 4 Ad. & E. 369; *Partridge v. Scott*, 3 M. &

W. 220; *Winslip v. Hudepeth*, 10 Exch. 5.

(x) *Onley v. Gardiner*, 4 M. & W. 500; *Clayton v. Corby*, 2 Q. B. 818; *Clay v. Thackeray*, 9 Car. & P. 47; 2 M. & R. 244; *Battisill v. Reed*, 18 C. B. 696; *Harbridge v. Warwick*, 3 Exch. 552; *James v. Plant*, 4 Ad. & El. 761; *Ringer v. Foley*, 2 J. & H. 555. As to the non-extinguishment of a necessary easement by unity of seisin, see *Flaquer v. Fleary*, 16 M. & W. 484. Compare on this point *Ladyman v. Gray*, L. R. 6 Ch. Ap. 762.

and between the last of them and the action, (if such interval intervened,) the estate sought to be affected was in the hands of a tenant for life or for years exceeding three years (y).

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But, as respects the easement of light, the mere fact of uninterrupted enjoyment for twenty years, otherwise than by consent given by deed or writing, confers an absolute title. The enjoyment need not be "as of right;" so that proof of a parol licence is immaterial (z); and so as there be no submission to or acquiescence in (a) an *adverse* interruption, absolute continuity of enjoyment is not essential (b); nor does the existence of disabilities or particular estates make any difference: but the enjoyment of the access of light must have been in the character of an *easement*, distinct from the enjoyment of the land sought to be affected; so that sixty years' enjoyment of lights looking out upon a garden which the owners of the house had held during that period, as tenants from year to year, was held insufficient to confer a title (c).

Except in
cases of light.

By interruption, it may be observed, is meant an adverse obstruction, and not a mere discontinuance of user (d); but the question, whether a discontinuance was voluntary or otherwise, is one for a jury (e); and although interruptions for less than a year will not in themselves prevent the operation of the Statute, yet they have a material bearing upon the question whether the enjoyment has, in fact, been "as of right" (f): and an interruption by a stranger is within the Act (g). So that, as between vendor and purchaser, it would seem to be necessary to give evidence of

Interruption
—what it is.

(y) *Clayton v. Corby*, 2 Q. B. 813.

(z) *Mayor, &c. of London v. Plasterers' Company*, 2 Moo. & R. 409; *Flight v. Thomas*, 11 Ad. & E. 688, see p. 695; and see *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630.

(a) *Glover v. Coleman*, L. R. 10 C. P. 108.

(b) *Ladyman v. Grace*, L. R. 6 Ch. Ap. 103.

(c) *Harbidge v. Warwick*, 3 Exch. 552.

(d) *Carr v. Foster*, 3 Q. B. 581; and see *Reg. v. Charley*, 12 Q. B. 515; *Ladyman v. Grace*, *ubi supra*.

(e) *Carr v. Foster*, *ubi supra*.

(f) *Eaton v. Swinness Water Works Co.*, 17 Q. B. 267, 274.

(g) *David v. Williams*, 16 Q. B. 546.

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(as user, as may be) continuous user (k). It has been held in the case of light, that payment of rent for the easement is not an "interruption;" but the Court left untouched the question whether such payment showed the enjoyment to be different from that contemplated by the Act (i). It has been decided by the House of Lords (k), confirming the decisions of the Court of Queen's Bench and Exchequer Chamber, that, under the 4th section of the Statute, which provides that no act shall be deemed an interruption, unless submitted to or acquiesced in for one year, a party who has uninterruptedly enjoyed or used the easement or right for any period exceeding one year short of the term which would be sufficient to confer a statutory title, can, upon being disturbed in his enjoyment or user at any time within the last year of the statutory term, at once claim the benefit of the Statute.

Title under the Statute of Limitations.

By the 3 & 4 Will IV c. 27, the time within which proceedings can be commenced either at Law or in Equity for the recovery of any land (l), or of any rent, is restricted to a period of twenty years (m), or, in case of continuous (n) disabilities (o), forty years from the time at which the right to proceed for the recovery of such land or rent first accrued to the plaintiff, or to the party through whom he claims (p). And the Act does away with the old doctrine of non-adverse possession, except in cases falling within the 15th section (q), which has now ceased to be operative.

"Land" — its meaning within the Act.

The word "land" by force of the first section includes all corporeal hereditaments, and also tithes (except tithes belonging to a spiritual or eleemosynary corporation sole), and

(k) See *Love v. Carpenter*, 6 Exch. 523.

(l) *Plassey's Co. v. Parish Clerks Co.*, 20 L. J. 361, Exch. Ch., see 364; 6 Exch. 630.

(m) *Wright v. Thomas*, 8 Cl. & F. 251; see as to interruption of ancient rights, and generally as to the law of rights, Latham's Law of Window

Lights.

(i) Or title deeds.

(n) See *supra*, p. 174.

(o) *Goodwin v. Marriott*, 3 Exch. 214.

(p) See *supra*, p. 17, 18, & 19.

(q) See *supra*, p. 1; and *Reynolds v. Edwards*, 2 L. J. W. 254.

(r) *Wright v. Doe*, 2 L. J. W. 224.

any share or interest therein (r). The operation of the Statute is confined to cases where there are two parties, each claiming an interest in the land or tithes; and does not apply as between tithe-owner and terre-tenant (s); but by 53 Geo. III. c. 127, s. 5, the period of account in Equity for tithes as between the terre-tenant and tithe-owner is limited to six years before filing the bill (t).

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The word "rent" by the first section includes heriots, and all services and suits for which a distress may be made; and all annuities, and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole). The term has been held to include quit-rents (u); but not rent reserved on a demise as between tenant and reversioner (x). So, heriots payable at uncertain intervals, and rent payable at greater intervals than twenty years (a case not likely to happen), do not appear to fall within the statutory definition, though they may still be considered as properly falling within the more general provisions of the second section (y).

"Rent"—its
meaning
within the
Act.

Filing of the bill, and not service, is the commencement of the suit for the purposes of the Act (z); and an amended bill dates from the filing of the original bill (a): but unnecessary delay in instituting or prosecuting the proceedings may disentitle the plaintiff to the assistance of the Court (b).

What is the
commence-
ment of the
suit.

(r) As to the statutory meaning of the word *land* in future Acts of Parliament, see 13 and 14 Vict. c. 21, sect. 4.

(s) See *Dea* and Chapter of *Ely* v. *Cock*, 15 M. & W. 617.

(t) *Goode v. Waters*, 20 L. J. 72.

(u) *De Beauvoir v. Owen*, 5 Exch. 166, 176; *Lord Chichester v. Hall*, 17 L. T. 121, Q. B.

(x) *Grant v. Ellis*, 9 M. & W. 118.

(y) See Baron Parke's judgment in *Owen v. De Beauvoir*, 16 M. & W. 566; *De Beauvoir v. Owen*, 5 Exch. 166, 176.

(z) *Coppin v. Gray*, 1 Y. & C. C. C. 205; *Morris v. Ellis*, 7 Jur. 413; *Purcell v. Blennerhasset*, 3 J. & L. 24; *Harrison v. Duignan*, 2 Dru. & W. 295; *Forster v. Thompson*, 4 Dru. & W. 303; *Boyd v. Higginson*, Fl. & K. 603; but see *Att.-Gen. v. Hall*, 11 Pri. 760.

(a) *Blair v. Ormond* 1 De G. & S. 428; *Byron v. Cooper*, 11 Cl. & Fin. 556.

(b) *Forster v. Thompson*; *Coppin v. Gray*, and *Boyd v. Higginson*, *ubi supra*.

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Saving in case of disability, &c.

The Act contains a saving clause in case of disability arising from infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond the seas (e); in any of which cases, an action may be brought at any time within ten years next after the time at which the person to whom the right to bring the action shall have first accrued, shall have ceased to be under such disability, or shall have died. This saving clause applies where there is a succession of disabilities without break, thus (f), where A., being an infant when her title accrued in 1833, married during minority and continued under coverture until she and her husband brought their action in 1870, it was held that the action was maintainable. No action is to be brought where a person has been subject to any of these disabilities, except within forty years after the right of action first accrued (g); and no time beyond this maximum limit is allowed for a succession of disabilities (h). No part of the United Kingdom, nor the Isle of Man (Channel Islands, nor any of the adjacent islands are to be considered as "beyond the seas" within the meaning of the Act (i); and this provision has been held to apply to cases of residence in Ireland, &c., before the passing of the Act, if the controversy do not arise until after the passing of it (k). By the Mercantile Law Amendment Act (l), the absence beyond the seas of the person entitled to sue is no longer to be a disability; and this enactment is retrospective.

Right when deemed to have accrued in certain cases.

The 3rd section of the Act fixes the time at which, in certain specified cases, the right shall be deemed to have accrued:

(c) *Wrixon v. Fize*, 3 Dru. & W. 104, 123.

(d) *Harrison v. Duignan*, *ubi suprd.*

(e) Sect. 16.

(f) *Borropes v. Elgin*, L. R. 6 Exch. 128.

(g) Sect. 17.

(h) Sect. 18.

(i) Sect. 19.

(k) *Ex parte Hemell*, 3 Y. & O. 617.

(l) 19 & 20 Vict. c. 97, ss 10, 12.

Pardo v. Bingham, L. R. 4 Ch. Ap. 725; — 20 27 & 28 Vict. c. 57.

these cases, however, are put merely by way of illustration, and not with the view of limiting the operation of the 2nd section (*m*). The general principle seems to be, that when a party has been in possession or receipt of the profits of the land, or in receipt of rent, the right accrued at the time when he last held such possession or received such profits or rent (*n*); while in the case of a party who has never had such possession or receipt, the right accrued at the time when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise (*o*), or otherwise) to enter into such possession or receipt. A mortgagee may, however, recover the mortgaged land at any time within twenty years after the last payment of principal or interest, notwithstanding twenty years or upwards may have elapsed since his right to enter accrued under the mortgage deed (*p*): and this, although a valid title to the land, may, under the Statute, have been acquired by a stranger as against the mortgagor (*q*): and a purchaser from a mortgagee under a power of sale in the mortgage deed, or from the mortgagee and mortgagor, is also, it appears, within the saving (*r*). Where the mortgage deed contains no provision for quiet enjoyment by the mortgagor until default, the mortgagee upon the execution of the deed has an immediate right of entry, and ejectment must be brought within twenty years after its date, in default of any payment by the mortgagor (*s*). It seems the better opinion that a mortgagee's *prima facie* absolute title by twenty years' possession is not defeated by his having kept accounts of the rents which he has received, or by his having otherwise acted as if he were only mortgagor (*t*). Time does not run against the grantee of an annuity charged on land, so long as the annuity is paid (*u*).

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General rule.

As against
mortgagee.

(*m*) See *James v. Salter*, 2 Bing. N. C. 505; 4 Sc. 168.

(*n*) *Owen v. De Beauvoir*, 16 M. & W. 547.

(*o*) See *James v. Salter*, 4 Sc. 168, 180.

(*p*) 7 Will. IV. & 1 Vict. c. 23.

(*q*) *Doe v. Eyre*, 17 Q. B. 866;

Ford v. Ager, 2 N. R. 366.

(*r*) *Doe v. Massey*, 17 Q. B. 373,

Doe v. Williams, 5 Ad. & E. 291, 297.

(*s*) *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553.

(*t*) *Baker v. Wetton*, 14 Sim. 426;

Sugd. Stat. 117.

(*u*) *Searle v. Colt*, 1 Y. & C. C. C. 36.

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An express
trust.

An express
trust.

As against an administrator, time runs from the death of the intestate (x).

Time does not begin to run against a remainderman, until his right to possession accrues (y); but as against his right to recover damages from a tenant for life who has committed a tortious act, e.g., who has wrongfully cut timber, the Statute runs as from the date of such act (z).

In case of
express trust.

In the case of an express trust, i.e., a trust expressly declared by a deed, will, or other written instrument, the right does not accrue under the 25th section of the Act until a conveyance has been made to a purchaser for valuable consideration; and then only as against such purchaser and persons claiming under him (a): but, in order to bring a case within this section, the relation of trustee and *cestui que trust* must be clearly constituted (b); though, of course, it is not necessary that the word "trust" should be employed, in order to constitute the relation (c).

Under Judica-
ture Act, 1873.

We may here remark that by the new Judicature Act the claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, is not to be barred by any Statute of Limitations (d).

Cases of ex-
press trust
within the
section.

A trust by deed or will for the payment of debts, annuities, portions or the like, is within the 25th section of the old

(x) Sect. 8. See *Holland v. Clark*, 1 Y. & C. C. C. 151, 170.

(y) *Thompson v. Simpson*, 1 Dru. & W. 459, 489.

(z) *Sengram v. Knight*, L. R. 3 Eq. 398; L. R. 2 Ch. Ap. 628; *Higginbotham v. Hawkins*, L. R. 7 Ch. Ap. 676.

(a) Sect. 25. *Att.-Gen. v. Flint*, 4 Ha. 167; *Petre v. Petre*, 1 Drew. 397; and see as to express trusts, *Seller v. Cunningham*, 1 Dru. & W. 668; *Barnes v. Robinson*, 4 Ha. 668; *Knight v.*

Bowyer, 23 Beav. 609; 2 De. G. & Jo. 421; *Bullock v. Deane*, 9 H. L. Ca. J.

(b) *Law v. Bagwell*, 4 Dru. & W. 398; *Young v. Lord Waterpark*, 13 Sin. 398; 10 Jur. 1; *Swine v. Robinson*, 10 Jur. 1.

(c) *C. v. C.*, 1 Dru. & W. 668; *Deane v. Deane*, 1 Dru. & W. 668; 10 Jur. 1; *Swine v. Robinson*, 10 Jur. 1.

(d) See 36 & 37 Vict. c. 66, sect. 25, sub-sect. 2.

Act (e); so also is a direction to trustees to pay the testator's debts, followed by a devise to them, subject to the payment thereof, upon trust for successive beneficiaries (f); but a charge of debts, even though coupled with a direction to pay them, is not an express trust, where there is no devise to the executors (g); so a beneficial devise of realty, charged with the payment of debts or legacies, is not a trustee within the section (h); but where an express trust is created with regard to charges upon land, it falls as much within the saving of the Statute, as if the trust had applied to the land itself (i); so, also, where the land is devised upon trusts for sale with a direction that the proceeds are to be considered as personal estates, and the land remains unsold (k). Where the assignee of a bankrupt took for his own benefit a conveyance from the trustee of a will of the legal estate in property to which the bankrupt was equitably entitled, it was held that he took it upon an express trust; viz, that declared by the will: and that the Statute afforded no defence to a suit for the recovery of the estate, and the mesne profits (l). A purchaser's liability for unpaid purchase-money, under the ordinary vendor's lien, is not an express trust (m).

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Cases not
within the
section.

But the rule that a trust is not barred by length of time, applies only as between *cestui que trust* and trustee; and not as between trustee and *cestui que trust* on the one side, and strangers on the other (n): and the case of one *cestui que trust* ousting his co-*cestui que trust* is not within the section (o).

The section
only applies
as between
trustee and
*cestui que
trust*.

(e) *Dillon v. Cruise*, 3 Ir. Eq. Rep. 70; *Young v. Lord Waterpark*, ubi *supra*; *Hunt v. Bateman*, ubi *supra*; *Francis v. Grover*, 5 Ha. 39.

(f) *Hunt v. Bateman*, ubi *supra*.

(g) *Dickinson v. Tinsdale*, 1 De G. J. & S. 52; and cases there cited; 31 Beav. 611.

(h) *Proud v. Proud*, 22 Beav. 234; and see *Jacquet v. Jacquet*, 27 Beav. 232. As to an executor constituting himself a trustee for a pecuniary legatee, see *Tyson v. Jackson*, 30 Beav.

331.

(i) *Burroues v. Gore*, 6 H. L. C. 907, 961.

(k) *Mulloy v. Bigg*, L. R. 18 Eq. 246.

(l) *Sturgis v. Morris*, 3 De G. & Jo. 1; 2 De G. F. & Jo. 223.

(m) *Taft v. Stephenson*, 7 Ha. 1; 1 De G. M. & G. 23.

(n) See *Llewellyn v. Mackworth*, Barnard, C. R. 445.

(o) *Burroughs v. M'Orright*, 1 J. & L. 290; *Lister v. Pickford*, 11 Jur.

**Time, when
fraud.**

In cases of concealed (that is, of designed and hidden: (p)) fraud, time does not begin to run until the fraud was, or, with reasonable diligence, might have been, discovered (q): but this is not to affect a *bond fide* purchaser for valuable consideration without notice or suspicion of the fraud. In the case of a firm, it has been held that the fraud of one member prevents time from running in favour of his copartners, although innocent of, and deriving no benefit from, the fraud (r).

The Act expressly provides against any interference with the rules which guide a Court of Equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of the Act (s).

**Charities
within the
Act.**

The Act contains no special saving in favour of charities; and it was for a long time doubted, and the earlier authorities seem to leave it an open question (t), whether the Statute was intended to apply to them. The ground for this doubt was, that prior to the Statute, no lapse of time was a bar to the claims of a charity; and the question was, whether this ancient equitable rule was still to prevail; or whether, in the absence of express exemption, the ordinary statutory limitation was applicable in the case of a purchaser

N. S. 649; *Knight v. Bowyer*, 23 Beav. 609; 2 De G. & Jo. 43. See as to agents, *Att.-Gen. v. Corp. of London*, 2 Mac. & G. 259. The institution of a suit to carry out the trusts of a will, of course does not preserve the right of the disinherited heir: *Simmons v. Rudall*, 1 Sim. N. R. 115.

(p) *Petre v. Petre*, 1 Drew. 397; *Dean v. Thwaite*, 21 Beav. 621.

(q) Sect. 26; and *Lewis v. Thomas*, 3 Ha. 26; *Dean v. Thwaite*, *ibisuprà*; *Smith v. Aden*, 26 Beav. 210.

(r) *Mair v. Bromley*, 2 Ph. 354; as to fraud consisting in secretly purchasing upon a purchase not complete, see *Edwards v. Thomas*, 6 Ha. 26; *Green-*

slade v. Dare, 20 Beav. 264; and compare *Manley v. Bewicke*, 3 K. & J. 346.

(s) Sect. 27. See *Life Assoc. of Scotland v. Siddal*, 2 De G. F. & J. 72, 73.

(t) See 1 Dru. & W. 233; 3 Dru. & W. 69; and see *Att.-Gen. v. Mayor of Coventry*, 2 Vern. 399; but see *Commissioners of Charitable Donations v. Wytrants*, 2 J. & L. 162, 165; *Att.-Gen. v. Magd. Coll.*, 18 Beav. 236, reversed 6 H. L. Ch. 189, 206; *Att.-Gen. v. Wilkins*, 17 Beav. 255; *Att.-Gen. v. Darcy*, 19 Beav. 521, reversed 4 De G. & Jo. 136; *Att.-Gen. v. Payne*, 27 Beav. 168.

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of a charity estate. It is now, however, well settled that charities fall within the general prohibition contained in the 24th section; and the ordinary statutory bar extends, not merely to an absolute alienation, but also to an improvident loss of the charity estate (*u*). But in order that the charity may be bound, there must be some person competent to make a claim on its behalf; thus, where there is no trustee, or none properly appointed, or where there are no ascertained objects of the charity, the Statute will not run (*x*): and where, as is generally the case, the charity estates are held upon express trusts, they fall within the saving of the 25th section.

Entry.

No person is to be deemed to have been in possession of any land, within the meaning of the Act, by reason merely of his having made an entry thereon (*y*): but this refers to a merely formal entry. If A., the owner, actually turn B., the occupier, out of possession, this saves the statutory bar, although A. retain possession for only one hour, and B. immediately resume it (*z*). So, where a writ of ejectment was served by the owner on a tenant at will, and it was then verbally arranged that the latter should remain in the occupation of part of the property during his life, it was held that this amounted to an actual entry; and that as a new tenancy was created, the Statute began to run from this time, and not from the date of the original tenancy (*a*).

Tenancy at will.

The 7th section enacts, that the right of a person entitled subject to a tenancy at will is to be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed

(*u*) *Att.-Gen. v. Payne*, and *Att.-Gen. v. Darcy*, *ubi supra*; and see *President of Magd. Coll. v. Att.-Gen.*, 6 H. L. C. 189.

(*v*) *Incorporated Society v. Richards*, 1 D. & War. 258; *Att.-Gen. v. Perce*, 2 D. & War. 67.

(*y*) Sect. 10.

(*z*) *Randall v. Sterens*, 2 El. & B. 641.

(*a*) *Locke v. Matthews*, 9 Jur. N. S. 875; 32 L. J. C. P. 98; 13 C. B. N. S. 753; and see *Randall v. Sterens*, 2 El. & B. 641.

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Mortgagor
and cestui que
trust.

to have determined; but it provides that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee. This proviso is applicable only to cases of express trusts; and not to cases of a quasi-fiduciary character. Where a purchaser is let into possession before completion, he is *prima facie* a tenant at will within the section (b). In cases of express trust, a cestui que trust, whose possession is consistent with the trust, is, for general purposes, tenant at will to his trustee (c); and the object of the above provision seems to have been, to preserve the legal estate of the trustee, which, under the old law, was secured by the necessity that possession should be adverse in order to take away the right of entry. However, in the case of *Doe d. Jacobs v. Phillips* (d), the Court of Queen's Bench seem to have considered the trustee of a term was barred by the possession of his cestui que trust: the opinions expressed upon this point were, however, extrajudicial; for, admitting the cestui que trust to have been tenant at will, the trustee before bringing the action should have determined the tenancy by notice, which he had not done (e); but these dicta in *Doe v. Phillips* have not been followed (f). In a recent case, where in 1771, parties under a building agreement and a private Act of Parliament, became entitled to peppercorn-leases for 99 years of a piece of reclaimed land adjoining the land comprised in the original agreement, and they entered and retained possession without acknowledgment of the freeholder's title or any payment of rent (the full rent mentioned in the agreement having been

(b) *Doe d. Stanway v. Rock*, 4 Man. & G. 30; and see *Doe v. Carter*, 9 Q. B. 863; *Westbrook v. Kerrick*, 2 Fos & Finl. 59.

(c) See 1 Jarm. Conv. by S. 28; Sug. 460.

(d) 10 Q. B. 130.

(e) As to what conduct amounts to an admission of a subsisting tenancy at will, see *Doe v. Groves*, 10 Q. B. 486.

(f) *Gurford v. Tuck*, 8 C. B. 291:

and see *Young v. Lord Waterpark*, 10 Jur. 1, L. C.; *Cox v. Dolman*, 2 De G. M. & G. 598; Lord St. Leonard's judgment in *Scott v. Scott*, 4 H. L. C. 1085; *Lord Mansfield v. Oyle*, 1 Jur. N. S. 414; 7 De G. M. & G. 181; and *Drummond v. Hunt*, L. R. 6 Q. B. 763. Executory trust, held not within the section: *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. R. 534, 553.

reserved upon leases of the lands therein comprised), it was held that their possession had been merely that of *cestuis que trust*; and that they were bound, on the expiration of the term, to give up the reclaimed land as well as the other land (g). It has, however, been held, that where land is vested in trustees in fee, in trust for A. for life, with remainders over, and A. having never been in the actual personal occupancy of the land, allows B. to occupy for twenty years, without payment of rent, or acknowledgment of title, B. thereby acquires a valid title to the *fee-simple* (h):—a doctrine, the practical importance of which can scarcely be over-estimated. A Court of Equity, however, will presume that a father entering on the estates of his infant children, so entered as their natural guardian; and not tortiously, unless the contrary be clearly shown; and will treat the case as that of a trustee (i). So, the entry by an uncle (the nearest male relative) upon lands of his infant niece, was not considered to be an entry by a stranger (k). Where the tenancy determined before the passing of the Act, the right of entry is to be considered as having accrued at the time of such determination (l); but, where the tenancy was subsisting when the Act came into operation, the right is barred by the lapse of twenty years from the end of one year after the commencement of the tenancy (m).

The right of a person entitled subject to a tenancy from year to year or other period, without any lease in writing (n), is to be deemed to have accrued at the end of the first year

Tenancy
from year to
year.

(g) *Drummond v. Sant*, L. R. 6 Q. B. 763, 766.

(h) *Melling v. Leak*, 16 C. B. 652.

(i) *Thomas v. Thomas*, 1 Jur. N. S. 1163; 2 K. & J. 79.

(k) *Pelly v. Bascomb*, 9 Jur. N. S. 1120; affirmed, 11 Jur. N. S. 52, but *Turner, L. J.*, declined to express any opinion.

(l) *Doe v. Thompson*, 6 Ad. & E. 721; *Doe v. Page*, 5 Q. B. 767; *Doe v. Bold*, 11 Q. B. 127; as to

what amounts to a determination of a tenancy at will, see *Doe v. Turner*, 7 M. & W. 226; *S. C.*, 9 M. & W. 643; *Doe v. Carter*, 9 Q. B. 863; *Randall v. Stevens*, 2 El. & B. 641.

(m) *Doe v. Afmore*, 9 Q. B. 555; *Doe v. Carter*, 9 Q. B. 863; *Doe v. Eyre*, 17 Q. B. 366; see *Randall v. Stevens*, 2 El. & B. 641.

(n) Which must be an instrument passing an interest, *Doe v. Gower*, 16 Jur. 100, Q. B.; 17 Q. B. 589.

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or other period, or last receipt of rent, which shall last happen (o). It has been held, that the performance of a service for which distress might have been made, *e.g.*, sweeping the church and tolling the bell, amounts to payment of rent within the meaning of this section (p).

Right of
action saved
by acknow-
ledgment of
title;

The acknowledgment in writing of title, given to the person entitled or his agent by the person in the actual possession or receipt of the profits of the land or receipt of the rent, is equivalent to such possession or receipt by the person so entitled (q): and time is constantly running from the last acknowledgment (r).

What is a
sufficient
acknowledg-
ment under
the 14th sec-
tion.

Whether a particular writing amounts to a sufficient acknowledgment of title within the 14th section, is a question for the Court, and not for a jury to decide (s): an acknowledgment may of course be made out from letters (t). If contained in a deed, it speaks, not from its date, but from the time of execution (u). An answer in a Chancery suit, though made under compulsion, is a sufficient acknowledgment (v). In a recent case (y), a question seems to have been raised whether an inscription on a stone let into a wall, stating by whom it was built and to whom it belonged, was or was not an acknowledgment within the Act; but the Court of Appeal held that while the inscription remained on the wall, no question of the Statute, or of adverse possession, could properly arise.

(o) Sect. 8.

(p) *Doe v. Benham*, 7 Q. B. 976; as to the 3th section being retrospective, see *Doe v. Sumner*, 14 M. & W. 39.

(q) Sect. 14.

(r) *Burroughs v. M'Creight*, 1 J. & L. 299, 304.

(s) *Doe v. Edmonds*, 6 M. & W. 295; *Morrell v. Frith*, 3 M. & W. 402; *Sidwell v. Mason*, 3 Jur. N. S. 549.

(t) *Interpreted Soc. v. Richards*, 1 Dru. & W. 250; *Faradon v. Cluff*,

10 M. & W. 572; *Lord St. John v. Boughton*, 9 Sim. 219.

(u) *Jayne v. Hughes*, 16 C. B. 430; *Lewis v. Thomas*, 3 Ha. 34.

(v) *Goode v. Jpb*, 5 Jur. N. S. 145; *Noodie v. Bannister*, 3. 402; and see as to what is a sufficient acknowledgment cases cited above; and *Truluck v. Robey*, 12 Sim. 402; *Holland v. Clark*, 1 Y. & C.C. C. 151; *Cawley v. Farnell*, 12 C. B. 291; *Smith v. Thorne*, 15 Q. B. 134.

(y) *Phillipson v. Gibbon*, L. R. 6 Ch. Ap. 423.

Under this section (z), the acknowledgment must be signed by the party in possession; and the signature of an agent is not sufficient, as in the cases provided for by the 40th and 42nd sections. As between landlord and tenant, the receipt of rent is equivalent to the receipt of the profits of the land (a); but the performance of a service for which no distress can be made, *e.g.*, keeping up a grindstone on the land for the use of the parties beneficially interested (b), does not prevent the Statute from running in favour of the occupiers.

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By whom the acknowledgment must be signed under this section.

The possession, &c., of one coparcener, joint tenant, or tenant in common, is not to be considered as the possession, &c., of any other (c); nor is the possession, &c., of the younger brother, or other relation of an heir, to be considered the possession, &c., of such heir (d).

Possession of one joint owner does not save the right of another.

The right of a remainderman, reversioner, or executory devisee (e), accrues when his estate falls into possession (f): and this, although he may have waived a previous forfeiture (g), and although, in the case of a reversioner, he, or the person through whom he claims, may have been in possession previously to the creation of the particular estate (h): but where the same person who is entitled to the particular estate is also entitled to the immediate beneficial reversion, time will run against both estates even although there may be no merger (i). Where rent amounting to 20s. *per annum*

Estates in remainder, &c.—when time begins to run against

(z) Compare sect. 28, where the acknowledgment must be signed by the mortgagee himself, or the person claiming through him.

(a) Sect. 35.

(b) *Doe d. Robinson v. Hinde*, 2 M. & R. 441; *Doe v. Benham*, 7 Q. B. 976, 978.

(c) Sect. 12: *Burroughs v. M'Creight*, 1 J. & L. 290; this clause is retrospective: see *Culley v. Doe d. Taylerson*, 3 Per. & D. 239; 11 Ad. & E. 1008; *Doe v. Horrocks*, 1 C. & K.

500; *Doe v. Woodroffe* 2 H. L. C. 811, 833.

(d) Sect. 13.

(e) See *James v. Salter*, 3 Bing. N. C. 544, 554.

(f) Sect. 3: see *Doe v. Edwards*, 6 M. & W. 295; *Duke of Leeds v. Earl Amherst*, 2 Ph. 125.

(g) Sect. 4.

(h) Sect. 5; and see *Doe v. Edwards*, 6 M. & W. 295.

(i) *Doe v. Mountdale*, 16 M. & W. 689.

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or upwards, reserved by a lease in writing, is received by a wrongful claimant, no fresh right accrues to the reversioner upon the determination of the lease (*k*); and the title to the reversion is in effect transferred to the wrongful recipient of the rent: but, in order to bar the rightful reversioner, there must be actual receipt of the rent by a wrongful claimant; its mere retention by the tenant is immaterial (*l*). The existence of a lease containing general words sufficient to comprise the property in question, but which was not intended to comprise it, and has not been acted on as respects such property, would not, it appears, prevent the Statute from running (*m*): and where the right of a person to an estate in possession is barred, the right of such person, and of all parties claiming under him, to any future estate, is also barred, unless the land or rent is in the meantime recovered by some person claiming in right of some intervening estate (*n*). Where there was a limitation to husband and wife for their joint lives, with remainder to the heirs of the husband, who became bankrupt, the last limitation was held to be a future estate within the meaning of this section: and the possession of the land by the surviving wife, although taken without legal proceedings, saved the right of the assignee of the husband (*o*).

Married
woman, when
barred.

When a married woman and her husband join in a conveyance of her estate by an assurance which, for want of a fine or statutory acknowledgment, is not binding on her, time will begin to run against her and her heirs only from the death of the husband, (if tenant by the curtesy;) or from her death in his lifetime (if they have no inheritable

(*k*) Sect. 9: this provision is retrospective; see *Doe v. Aysell*, 9 Q. B. 328; see this case, also, p. 355, as to the construction of the word "rent" throughout the 9th sect.; and see *Grant v. Ellis*, 9 M. & W. 113.

(*l*) *Doe v. Openham*, 7 M. & W. 181; *Chadwick v. Broadwood*, 3 Deav. 308; see, however, *Ex parte Jones*, 4 Y. & C.

466; as to rents of mines reserved in specie, see *Denys v. Shuckburgh*, 4 Y. & C. 42.

(*m*) See *Dean and Chapter of Ely v. Bliss*, 5 Deav. 574.

(*n*) Sect. 20; and see *Doe v. Mouldale*, 16 M. & W. 689—698.

(*o*) *Doe v. Liccardge*, 11 M. & W. 517.

issue (*p*): but where there is no conveyance binding on the husband, but a mere abandonment of possession by husband and wife, it has been held that time will run against her from the date of such abandonment (*q*).

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By the 21st section it is enacted, "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred" (*r*): and the 22nd section, in effect, provides that time which has commenced running against a deceased tenant in tail, shall be counted as against persons claiming in respect of any estate, &c., which he "might lawfully have barred." These sections are retrospective: and when time has begun to run against the tenant in tail, the remainderman has no extended time allowed by reason of his being under disability, when his estate falls into possession (*s*). But when the tenant in tail, instead of being dispossessed, or allowing another person to usurp possession, purports to convey the estate by an assurance, which, although voidable by the issue in tail, is binding on himself personally during his life, the issue has the full statutory period from his death in which to claim the estate (*t*).

Remainders expectant on an estate tail are barred when estate tail is barred.

Time runs against the estate tail and the remainders.

(*p*) *Jumpson v. Pitchers*, 13 Sim. 327; see Sug. 483; *Neesom v. Clark-on*, 2 Ha. 163.

(*q*) *Doe v. Brampton*, 3 Ad. & E. 63. It has been held in Ireland that the mere omission to work unopened mines or quarries reserved to the grantor of the surface, is not an abandonment of possession; and that, in order that the statutes may operate, there must be both dereliction by the person who has the right and actual

possession, whether adverse or not, to be protected; *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514, 526; *Smith v. Lloyd*, 9 Exch. 572; and see *Keyse v. Powell*, 2 El. & B. 132; *Tottenham v. Byrne*, 12 Ir. C. L. Rep. 873, Sugd. Stat. 33.

(*r*) See *Austin v. Llewellyn*, 9 Exch. 276.

(*s*) *Goodall v. Skerratt*, 3 Dre. 216.

(*t*) *Cannon v. Rimington*, 12 C. B. 1; but see report of *Goodall v. Skerratt*, in 1 Jur. N. S. 57.

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But tenant in
tail must
have been *en-
juris*, *seable*.

The expression in each of these two sections "might lawfully have barred," seems to require personal legal capacity on the part of the tenant in tail to bar the remainders: from which this singular result would seem to follow; *viz.*, suppose the right of a tenant in tail to accrue in possession when he is one year old, and that he attains twenty-one, and dies the next day under no personal incapacity, the Statute would run against remaindermen as from the time when his right first accrued: but suppose him to die just before attaining twenty-one, or to attain twenty-one an idiot or lunatic, and so to continue until his death, in such a case it would seem that remaindermen would be in no way affected by the above sections of the Act. This construction, if it be a correct one, must, in many cases where land has been brought into settlement, materially interfere with the beneficial operation of the Statute upon titles.

Base fee—;
when to
become a fee
simple.

The 23rd section has been a good deal discussed in the profession. According to Lord St. Leonards its effect is, "that where a tenant in tail executes a deed enrolled under the 3 & 4 Will. IV. c. 74, which for want of the consent of the protector, operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could, without the consent of any third person, have barred the remainders over under the 3 & 4 Will. IV. c. 74; but this operation will not be effected, if the assurance already executed would not, if then executed without consent, have operated to bar the estates in remainder" (*v*). It would seem that the section, which applies only to assurances which are effectual to bar the entail (*x*), has not a retrospective operation (*y*).

Here it may be observed, the same question arises as to the necessity for personal legal capacity on the part of the

(*x*) See pp. 493, 484.

(*y*) See *Penny v. Allen*, 7 De G.

(*z*) *Morgan v. Morgan*, L. R. M. & G. 400; and 1 Jerm. Conv. by 10 Eq. 95.

S. 32.

tenant in tail or his issue to execute a disentailing conveyance, as well as the non-existence of a protector, at the time when the Statute is to begin to run.

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And in the opinion of Lord St. Leonards base fees which were created before the passing of the 3 & 4 Will. IV. c. 27, are, as a general rule, rendered unassailable by the 36th section of the Act (z).

The right of a mortgagor to redeem (a), is to be barred at the end of twenty years from the mortgagee taking possession, or last giving a written acknowledgment of title. The acknowledgment must be given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person; and the section has been held to be retrospective; so that where, before the Act, a mortgage had been twice transferred, as such, by deeds to which the mortgagor was no party, and no acknowledgment of the equity of redemption had been given to him for seventeen years before the passing of the Act, these years were counted against him upon his subsequently filing a bill to redeem (b). An acknowledgment given to one of several mortgagors, or representatives of a mortgagor, operates in favour of all; but an acknowledgment by one of several mortgagees, or representatives of a mortgagee, does not affect the proportionate interests of the others (c). If a mortgagee while in possession is himself entitled to such possession in respect of a life or other limited interest in, or as a tenant in common of, the equity of redemption, the period for which he is so entitled will not be counted against the parties entitled in remainder, or together with him, to the equity of redemption (d).

Equity of redemption, when to be barred.

Acknowledgment.

If mortgagee is entitled to possession, as being interested in equity of redemption, time does not run.

(z) Sug. 484.

(a) See sect. 28; *Browne v. Bishop of Cork*, 1 Dru. & Wal. 700.

(b) *Batchelor v. Middleton*, 6 Ha. 75. Compare *Forsyth v. Bristolow*, 8 Ex. 716, a case under the 40th section.

(c) Sect. 28; and see *Richardson v. Young*, L. R. 10 Eq. 275.

(p) *Rafferty v. King*, 1 Ke. 601; *Tull v. Owen*, 4 Y. & C. 201; *Hyde v. Dallaway*, 2 Ha. 528; *Wynne v. Styan*, 2 Ph. 303; *Browne v. Bishop of Cork*, 1 Dru. & Wal. 714.

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Extinguished
right to re-
deem may be
revived by
acknowledg-
ment.

The mortgagor's title to redeem, though bound, and, under the 34th section of the Act, "extinguished," by twenty years' adverse possession by the mortgagee, may be revived by a subsequent acknowledgment (e). This decision, although affirmed by the Lords Justices, cannot without difficulty, if at all, be reconciled with the language of the 34th section; but the point can now be otherwise settled only by the final Court of Appeal. Where a mortgagee in fee, having been in possession for more than twenty years, devised the estate to his son in tail with limitations over, it was held that an acknowledgment by the tenant in tail of the mortgagor's title revived the right to redeem, so as to bind the remaindermen (f). Such an acknowledgment by a tenant for life would, however, it is conceived, bind only himself. A transfer of a mortgage, though expressly made subject to the mortgagor's equity of redemption, but to which the mortgagor is not a party, is not a sufficient acknowledgment (g). A formal acknowledgment of course is not necessary, if the effect of the admission is that the person making it has a redeemable estate; thus, where a mortgagee wrote to the solicitor of the mortgagor, "I do not see the use of a meeting, unless some party is ready with the money to pay me off," this was held sufficient (h).

Time allowed
for action, &c.,
by spiritual or
ecclesiastical
corporation
sole.

No spiritual or ecclesiastical corporation sole is to recover any land or rents but within two successive incumbencies, and six years, or sixty years, (whichever be the longer period,) from the time when the right accrued (i).

(e) *Stanfield v. Hobson*, 16 Beav. 236; 3 De G. M. & G. 620; see *Thompson v. Bowyer*, 9 Jur. N. S. 863.

(f) *Pendleton v. Rooth*, 1 Giff. 35; 1 De G. F. & Jo. 81.

(g) *Lucas v. Dennison*, 13 Sim. 584; and see further as to what is a sufficient acknowledgment, *supra*, p. 386, and *infra*, p. 387; *Hodde v. Healey*, 6 Madd. 185; *Batchelor v. Middleton*,

6 Ha. 75; *Thompson v. Bowyer*, 9 Jur. N. S. 863. See too, *Grayson v. Hindley*, 10 Jur. 1083.

(h) *Stanfield v. Hobson*, 3 De G. M. & G. 620; and see *Hodde v. Healey*, 6 Madd. 186; *Richardson v. Younge*, L. R. 10 Eq. 275.

(i) Sect. 29; *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. Rep. 251.

No advowson is to be recovered, or right of presentation enforced, but within three successive adverse incumbencies or sixty years (whichever be the longer period), reckoning therein incumbencies by lapse but not incumbencies after promotions to bishoprics (*k*); and a patron claiming in respect of an estate in remainder on an estate tail, is, for the purposes of the statutory bar, to be considered as claiming through the person entitled to such estate tail (*l*). Successive adverse incumbencies extending over one hundred years form an absolute bar, unless the benefice has been since enjoyed under a rightful presentation; and in calculating this period, a presentation adverse to the owner of a particular estate is considered adverse to remaindermen (*m*).

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For recovery
of advowson
or right of
presentation.

No money charged upon or payable out of any land or rent, nor any legacy, is to be recovered but within twenty years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for or release of the same; unless there has been some intermediate payment in respect of principal or interest, or acknowledgment of right given in writing: in which case the twenty years are to run from the date of such payment or acknowledgment (*n*).

For recovery
of money
charged on
land.

From the above period must be excluded the time (if any) during which the person entitled to the charge has been also entitled to the possession of the land or rent; or during which the rents of the estate charged have been exhausted by prior incumbrancers (*o*): and where a term was vested in trustees, in trust to raise portions for younger children, and, subject thereto, the estate was limited in strict settlement, it was held by Lord Lyndhurst, C., that the possession of the estate by the parties in reversion was consistent with the trust, and that the statutory bar did not apply (*p*). So also, in the

Time to be
excluded.

(*k*) Sects. 30 & 31; see *Robinson v. Marquis of Bristol*, 20 L. J. 208, C. B.; 15 Jur. 926; see as to Ireland, 6 & 7 Vict. c. 54, and 7 & 8 Vict. c. 27.

(*l*) Sect. 32.

(*m*) Sect. 33.

(*n*) Sect. 40.

(*o*) *Knight v. Bowyer*, 23 Beav. 635.

(*p*) *Young v. Lord Waterpark*, 13 Sim. 204; *S. C.* on appeal, 10 Jur. 1.

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case of a term in trust to raise annuities (*q*): so, where an outstanding term is assigned in trust for a mortgagee (*r*): so, legatees, whose legacies are charged on land, are not to be affected by lapse of time, while any prior charge is subsisting (*s*): so, where a legacy given upon certain trusts has been severed from the general estate, time does not run against the legatee under this section; although the fund may remain in the hands of the executor (*t*): so, where a trust fund was inadvertently paid by the trustee to a person not entitled to it, the Statute was held to be no bar to the rightful claimant (*u*): so, where a mortgagee is also tenant for life of the mortgaged estate, time does not run against the mortgage title until his death (*v*): and the same rule applies where he is tenant in common with others of the mortgaged estate (*w*).

What cases
fall within the
40th section.;

The 40th section has reference not to the land itself, but to actions for the recovery of money, as, *e.g.*, a mortgage debt secured by covenant, or collateral bond (*z*); and a judgment debt is "money payable out of land" within the meaning of the section (*a*): so, also, a vendor's lien for unpaid purchase-money (*b*); but whether the produce of real estate directed to be sold is "money payable out of land," has been doubted (*c*). Money due on a bond executed by an an-

(*q*) *Chz v. Dolman*, 2 Do G. M. & G. 592; and see *Petre v. Petre*, 1 Dru. 396; *Scott v. Scott*, 18 Jur. 755, H. L.; *Low v. Nash*, 23 L. T. 223; *Swon v. Booth*, 2 Kay & J. 132; 8 Do G. M. & G. 89; *Lewis v. Duncombe*, 7 Jur. N. S. 695.

(*r*) *Shaw v. Johnson*, 7 Jur. N. S. 1005; and see *O'Hara's Tontine*, 6 W. R. 45; and *supra* as to express trusts.

(*s*) *Faulkner v. Daniel*, 3 Ha. 212.

(*t*) *Phillips v. Munnings*, 2 My. & Cr. 309; *Reck v. Callen*, 6 Ha. 536; *Dillon v. Orms*, 3 Ir. Eq. R. 70; *Dunnes v. Bullock*, 25 Beav. 54; 9 H. L. Ca. 1.

(*u*) *Harris v. Harris*, 29 Beav. 110.

(*v*) *Spickard v. Huston*, Kay, 668.

(*w*) *Waine v. Ryan*, 2 Phill 303; and *vide supra*, p. 391.

(*z*) *Doe v. Williams*, 5 Ad. & Ell. 296; *Sheppard v. Duke*, 9 Sim. 567.

(*a*) *Henry v. Smith*, 2 Dru. & W. 381; *Berrington v. Evans*, 1 Y. & C. 434; *Watson v. Birch*, 15 Sim. 523; 11 Jur. 198.

(*b*) *Toft v. Stephenson*, 7 Ha. 1; 1 Do G. M. & G. 28; 5 Do G. M. & G. 735.

(*c*) *Pawsey v. Barnes*, 20 L. J. (Cb. 393, V.-C. K. B.; 15 Jur. 945; but see *Bowyer v. Woodman*, L.R. 3 Eq. 313, where the produce of real estate directed to be sold was held to be money payable out of land within the 42nd section; *Pawsey v. Barnes* does not appear to have been cited.

cestor (*d*), and turnpike tolls (*e*), do not fall under the Act: but the section applies to any legacy, whether payable out of real or personal estate (*f*); and a share of residue is a "legacy" within the section (*g*). By the 23 and 24 Vict. c. 38 (*h*), the operation of this section is extended to claims upon the personal estates of intestates.

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Whether a foreclosure suit be a suit for the recovery of "money charged upon land," within the 40th section, or for the recovery of land within the 24th section, seems to be doubtful (*i*): a vendor's suit for the recovery of his unpaid purchase-money has been held to be within the 40th section (*k*): but a suit for the recovery of a legacy held on certain trusts, which has been severed from the general estate, although retained by the executor, is a suit for the administration of the trust fund, and this section affords no statutory bar (*l*). And it seems probable that the statutory bar does not apply, where the bill was filed before, though no decree was made until after, the passing of the Act (*m*).

What suits
are considered
to be such
within the
Act.

Payment by any person authorized to make it, but not by a mere stranger, is sufficient to bring the case within this section (*n*): so is payment by the parties claiming the land,

What is
sufficient pay-
ment.

And compare *Mulrow v. Bigg*, L. R. 18 Eq. 246, where a devise of land in trust for sale with a direction that the proceeds were to be considered personalty, was held to be an express trust of land within sect. 25: and *vide supra*.

(*d*) *Roddam v. Morley*, 1 Do G. & J. 1.

(*e*) *Melish v. Brooks*, 3 Beav. 22; *aliter* as to quarries, &c.; *McDonnell v. McKinty*, 10 Ir. L. R. 521.

(*f*) *Sheppard v. Duke*, 6 Sim. 567.

(*g*) *Christian v. Dereretz*, 12 Sim. 264; *Sheppard v. Duke*, 6 Sim. 567; *Prior v. Hornblow*, 2 Y. & C. 200.

(*h*) See sect. 13.

(*i*) See *Dearman v. Wyche*, 9 Sim. 570; *Du Vigier v. Lee*, 2 Ha. 334;

Sinclair v. Jackson, 17 Beav. 410; *et contrà*, *Wriem v. Vice*, 2 C. & L. 138; *S. C.*, 2 Dru. & W. 192; 3 Dru. & W. 104; Sug. on Stat. 117.

(*k*) *Toft v. Stephenson*, 7 Ha. 1; 1 Do G. M. & G. 28; 5 Do G. M. & G. 735.

(*l*) *Phillipo v. Munnings*, 2 My. & Cr. 309; *Downes v. Bullock*, 25 Beav. 54; 9 H. L. Ca. 1; *Harcourt v. White*, 23 Beav. 303; see and consider *Edmunds v. Waugh*, L. R. 1 Eq. 418; and *Tyson v. Jackson*, 30 Beav. 384, where the executor constituted himself an express trustee of the legacy.

(*m*) *Ravenscroft v. Friaby*, 1 Coll. 16.

(*n*) *Roman v. Andrews*, 1 Ir. Ch. Rep. 106.

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or their trustees (o): but there must be a proper hand to receive, and give a discharge for the money paid (p); and where the person liable to pay is also the person entitled to receive, no question of limitation under the Statute can arise (q). Payment of interest by a devisee for life on his testator's specialty debt is sufficient as against the remainderman (r): so, payment of interest on an Irish mortgage made by a receiver of the mortgaged estates, appointed under the Irish Mortgage Act, 11 & 12 Geo. III., c. 10, has been held to be payment by an agent within this section (s); so, also, payment of interest by a dowress in possession of the mortgaged estate, with the consent of the heir of the mortgagor (t). It would seem that, in order to constitute a sufficient payment, it is not essential that money should actually pass between the parties; thus, where a debtor put his hand into his pocket, as if for the purpose of paying the interest due, and the creditor anticipated actual payment by handing him a written receipt for it, this was held to be a sufficient payment (u): but where A. being indebted to B. on three several debts, two of which were barred by the Statute, made a payment of interest at B.'s request, without referring to any of the debts, the payment was treated as exclusively made in respect of the unbarred debt; and not

(o) *Toft v. Stephenson*, 1 De G. M. & G. 40; 5 De G. M. & G. 735.

(p) *M'Carthy v. Daunt*, 11 Ir. Eq. Rep. 29; and see as to payment by a person filling a double character, *Fordham v. Wallis*, 10 Ha. 217.

(q) *Binns v. Nicholls*, L. R. 2 Eq. 256; *Seagram v. Knight*, L. R. 2 Ch. Ap. 628.

(r) *Roddam v. Morley*, 1 De G. & Jo. 1, overruling V. C. W. 2 K. & Jo. 336; see *Coope v. Creswell*, L. R. 2 Ch. Ap. 112, 126; in which the ultimate decision in *Roddam v. Morley*, was questioned by Lord Chelmsford, C., but in *Pears v. Laing*, L. R. 12 Eq. 41, it was expressly approved and followed, notwithstanding the adverse comments upon it in *Coope v. Creswell*, and must now be regarded

as well settled law. In *Dickinson v. Teasdale*, 31 Beav. 511; 1 De G. J. & S. 52, acknowledgment by one of several devisees subject to a charge, was held sufficient to bind the others; but in *Richardson v. Young*, L. R. 6 Ch. Ap. 473, affirming V. C. M. L. R. 10 Eq. 275, acknowledgment by one of two mortgagees, who on the face of the deed appeared to be trustees of the mortgage debt was held insufficient to keep alive the right of redemption; and vide *supra*, p. 391.

(s) *Chinnery v. Evans*, 11 H. L. Ca. 115.

(t) *Ames v. Mantering*, 26 Beav. 583.

(u) *Maber v. Maber*, L. R. 2 Ex. 153, dissentiente Bramwell, B.

as an acknowledgment of the debts which were already barred (*x*).

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The acknowledgment referred to in the 40th and 42nd sections, must be in writing; but may be signed by the agent of the person giving it (*y*): and the Courts, in determining what is a sufficient acknowledgment under these sections, have adopted a liberal construction of the language of the Act (*z*): thus, an affidavit, or answer, though made under compulsion, may be a sufficient acknowledgment of a debt or claim (*a*): but not the report of the Master under the former practice, nor, it is conceived, the Chief Clerk's certificate under the present practice in a suit (*b*). An admission in the will of the debtor of the existence of a judgment debt has been held a sufficient acknowledgment (*c*); so, any admission in writing by the debtor, of the existence of an unsettled account, either with or without a promise to pay the balance (if any) due, will prevent the Statute running (*d*); so, also, his written promise to pay so soon as he is able (*e*): so, a letter by the solicitor of the purchaser's devisees to the solicitor of the vendor's assignees that the purchase-money was lying idle, was held to be a sufficient acknowledgment of the existence of the vendor's lien (*f*): but where there is no absolute admission that anything is due, but simply an agreement to refer a disputed account to arbitration, and no award is made, there is no sufficient acknowledgment to take the case out of the Statute (*g*). So,

Acknowledgment—what is sufficient under sects. 40 & 42.

(*x*) *Naah v. Hodgson*, Kay, 650; 6 De G. M. & G. 474; but *quære* if the interest paid had been more than was due on the unbarred debt, would not the payment have been an acknowledgment of the other debts? See also *Spickerell v. Hotham*, Kay, 669.

(*y*) *Aliter* under sects. 11 & 28, *vide supra*, p. 386.

(*z*) See *Blair v. Nugent*, 3 Jones & L. 673.

(*a*) *Goode v. Job*, 5 Jur. N. S. 145; *Moore v. Bannister*, *ib.* 402; *Triatram v. Harte*, 1 Longfield & T. 186; and see also *Vincent v. Willington*, *ib.* 456;

Barrowen v. Gore, 6 H. L. Ca. 909.

(*b*) *Hill v. Stowell*, 2 Jebb & S. 389.

(*c*) *Millington v. Thompson*, 3 Ir. Ch. R. 236.

(*d*) *Prance v. Simpson*, Kay, 678; *re River Steamer Co., Mitchell's claim*, L. R. 6 Ch., Ap. 822.

(*e*) *Hammond v. Smith*, 33 Beav. 452.

(*f*) *Toft v. Stephenson*, 1 De G. M. & G. 28; and see S. C., 5 De G. M. & G. 935.

(*g*) *Hales v. Stevenson*, 9 Jur. N. S. 300; but see *Chestyn v. Dalby*, 4 Y. & C. 238.

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a letter admitting the existence of the debt, but stating the debtor's inability to pay in full, and proposing a composition, has been held insufficient (*k*); so, also, a letter by the debtor disclaiming an intention to avail himself of the Statute, but professing his inability to pay, and soliciting further indulgence (*i*). Where money was lent to a trader to accumulate for the creditor's benefit at compound interest, it was held that the Statute began to run at the date of the advance; and that periodical entries in the debtor's books, carrying over interest to the creditor's account, did not take the case out of the Statute (*k*).

**Arrears of
dower.**

No arrears of dower are to be recoverable for more than six years (*l*); and no exception is made of cases where an acknowledgment of title has been given.

**Arrears of
rent.**

No arrears of rent (*m*) (which includes a fee-farm rent (*n*),) and tithe rent-charge (*o*), or of interest in respect of any sum of money charged upon or payable out (*p*) of any land or rent, or in respect of any legacy, are to be recoverable for more than six years (*q*) from the time when they became due, or when a written acknowledgment (*r*) of the same was last given, unless a prior incumbrancer has been in possession within one year before the commencement of the proceedings for the recovery of such arrears, in which

* (*l*) *Everett v. Robinson*, 4 Jur. N. S. 1083; and cases cited.

(*i*) *Rackham v. Marriott*, 3 Jur. N. S. 495 Ex. Ch.

(*k*) *Jackson v. Ogy*, Johns. 976.

(*l*) Sect. 41; *Bamford v. Bamford*, 5 Ha. 203.

(*m*) Sect. 42.

(*n*) *Humphrey v. Gery*, 7 C. B. 567.

(*o*) *Ecclesiastical Commissioners v. Lord Blyth*, 5 Lr. C. R. 46.

(*p*) Inclosing judgments, *Henry v. Smith*, 2 Dru. & W. 381; and see *Burne v. Robinson*, 1 Dru. & Wal. 688. A new right has been held in Ireland to revive on a judgment being revived

on a *sci. fa.*: see *Re Blake*, 2 Ir. Ch. R. 643. A share of the proceeds of sale of real estate directed to be sold has been held to be money payable out of land within this section, *Bowyer v. Woodman*, L. R. 3 Eq. 313, and *vide supra*, p. 394, and cases cited in note (*e*).

(*q*) Time is reckoned from the filing of the bill, *Chappell v. Row*, 1 De G. M. & G. 398.

(*r*) Return in insolvent's schedule held sufficient, *Barratt v. Birmingham*, 11 L. & K. 556; but see *Hibson v. Burns* 18 Ir. L. R. 286.

case they may be recovered for the whole period of such possession (s); that is, if the prior incumbrance affect the estate or interest upon which the subsequent incumbrance is a charge (t). Where there are several incumbrancers on the same land, ranking in a series one after the other, payment or acknowledgment by the mortgagor will not keep alive the right of the first mortgagee to arrears of interest beyond the period of six years as against the subsequent mortgagees (v). It was held by Sir J. Wigram, V.-C., that if the interest on a mortgage debt is secured by bond or covenant, arrears for twenty years can be recovered as against the mortgaged estate (x); but this decision, which was opposed to the opinion of Lord St. Leonards (y), has been overruled (z); even in a case where the mortgaged estate was a reversion (u): and it is now well settled that as against the mortgaged estate, the mortgagee can only recover six years' arrears of interest, and must look to the bond or covenant of the mortgagor for the recovery of any further arrears (b). This section, however, does not bar the right to recover arrears of any annuity, charged on a reversionary interest in land, so long as the interest continues reversionary (c): nor does it, it is conceived, affect the validity of a clause frequently inserted in mortgages of reversions, and sometimes of other property, and which provides for the capitalization of interest in the event of its falling into arrear: and where the proceeds of a mortgaged estate, sold under a power of sale, were paid into Court in a suit for the administration of the mortgagee's estate, a

(s) Sect. 42; *Francis v. Grover*, 5 Ha. 39; *Drought v. Jones*, 2 Ir. Eq. R. 303.

(t) *Vincent v. Going*, 1 J. & L. 697.

(u) *Bolding v. Lane*, 1 De G. J. & Sm. 122; see now 16 & 17 Vict. c. 113, and 19 & 20 Vict. c. 97.

(x) *Du Vigier v. Lee*, 2 Ha. 326.

(y) *Harrison v. Duignan*, 2 Dru. & W. 295; *Hughes v. Kelly*, 3 Dru. & W. 492; and see *Hodges v. Croydon Canal Co.*, 3 Beav. 86.

(z) *Hunter v. Nockolds*, 1 Mac. & G. 640, 653; *Humfrey v. Gery*, 7 C. B. 507; *Round v. Bell*, 30 Beav. 121; *Shaw v. Johnson*, 7 Jur. N. S. 1005; 1 Dr. & S. 419; *Mason v. Broadbent*, 33 Beav. 296.

(a) *Singlair v. Jackson*, 17 Beav. 405.

(b) See *Bowyer v. Woodman*, L. R. 3 Eq. 313.

(c) *Wheeler v. Howell*, 3 K. & Jo. 193.

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petition by his representatives for the payment out of the fund was held not to be a suit for the recovery of arrears of interest within the 42nd section, so as to disentitle them to recover arrears for nearly twenty years (*d*): so, it has been held that the heirs of a mortgagor, who for himself and his heirs has covenanted to pay the principal and interest, cannot *redeem* except upon payment of the arrears for twenty years, the mortgagee being at liberty to tack the personal liability under the covenant as against the heir; but the decision would probably be otherwise, if the suit were by the mortgagor himself (*e*). So, rent, or a rent-charge, although recoverable against a covenantor for twenty years under 3 & 4 Will. IV. c. 42 (*f*), is recoverable as against the land only for six years (*g*): and a legal rent-charge is wholly lost by non-payment for a period exceeding the statutory limit (*h*). An annuity charged on land comes within the meaning of the word "rent" in the 42nd section, and therefore no more than six years' arrears are recoverable (*i*); but the position of the grantee of such an annuity which has been duly paid, where the grantor has retained possession of the estate without acknowledgment of title, for a period exceeding the statutory limit, seems to be doubtful (*k*). It has been held that an annuity given out of personalty is not within this section; for though it is a legacy, yet the yearly payments made in respect of it cannot be treated as "interest in respect of a legacy" (*l*). In the case of a legacy, and of a suit to ad-

(*d*) *Edmunds v. Waugh*, 1. R. 1 Eq. 148; but see and compare *Mason v. Broadbent*, 33 Beav. 296.

(*e*) *Elvy v. Norwood*, 5 De G. & S. 240; and see 17 Beav. 413.

(*f*) See *Paget v. Foley*, 2 Bing. N. C. 679; *Sims v. Thomas*, 12 Ad. & E. 536; *Manning v. Phelps*, 10 Exch. 59.

(*g*) 1 Mac. & G. 653.

(*h*) *James v. Salter*, 3 Bing. N. C. 544; *Langton v. Langton*, 18 Jur. 923.

(*i*) *Ferguson v. Livingston*, 9 Ir. Eq. R. 202; *Francis v. Grover*, 5 Ha. 39.

(*k*) See *Searle v. Colt*, 1 Y. & C. C. C. 36. *supra*, p. 379, n. (*u*). Payment by executors and trustees in possession has been held binding as against the *cestui que usque*: *Francis v. Grover*, 5 Ha. 39; and see *Tuft v. Stephenson*, 1 De G. M. & G. 37.

(*l*) *In re Ashwell's Will*, 'Johns. 112, where 37 years' arrears were recovered against the residuary legatees. But *quære* whether such an annuity is not a series of separate legacies, each subject to a distinct contingency, and as such within the 40th. sec.; and see *Roch v. Callen*, 6 Ha. 531.

minister the estate, the legatee has been held entitled to arrears of interest for six years before the date of carrying in his claim before the Master (*m*).

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It has been decided, in Ireland, by Sugden, C., that a purchaser under a decree of the Court can be compelled to accept a title depending upon adverse possession, verified, like any other fact, in the Master's office (*n*); and the general principle would probably be maintained by the English Courts in a suit for specific performance. Its beneficial application, as between vendors and purchasers, is, however, in the case particularly of missing instruments, materially affected by the difficulty which exists of determining the time when the right of action may have accrued to the supposed adverse claimants: for instance, where forty years have elapsed since the death intestate of a former owner seised in fee simple in possession, the Statute may, as a general rule, be safely relied on as against the claim of any latent heir; as his right of action must ordinarily (*o*) have accrued at the death: but if the intestacy itself be in dispute, and there be reason to apprehend the existence of a will whose contents are unknown, here the Statute is evidently a very slight protection; as limitations may have been created under which a right of action may exist for an indefinite period.

Purchaser
compelled to
accept title
depending on
Statute of
Limitations.

It sometimes happens that lapse of time increases instead of diminishing a known risk attending a title; e.g., where a settlement, by deed or will, duly executed and attested, has created limitations in remainder, some of which are still subsisting, or capable of taking effect, and the invalidity of

Lapse of
time may
sometimes
render a title
less safe.

(*m*) *Handley v. Wood*, 9 Ha. 201.

(*n*) *Scott v. Nixon*, 3 Dru. & W. 388: the verification was merely by affidavit; but the Court expressly stated that the purchaser might, had he pleased, have insisted on a regular examination of witnesses: see *Kirkwood v. Lloyd*, 12 L. Eq. R. 585, 598. *Moulton v. Edmonds*, 1 De G. F. & Jo.

246.

(*o*) There is a possible but very rare exception under the old law of inheritance, in the case of an estate descending to a person who is not full heir, and whose title as temporary heir may be subsequently displaced by the birth of a full heir.

~~Case, THE~~ the settlement on the ground of personal incapacity on the part of the settlor, or of fraud practised upon him, &c., has been established in proceedings against the party in possession, and, perhaps, other parties, but which are not binding on all the remaindermen: in such a case, inasmuch as lapse of time increases the difficulty of procuring evidence of the facts necessary to invalidate a *prima facie* valid document, the risk attending the title may for a very long period be said to increase *de die in diem*.

Possession under the Act bars the right, and not the remedy only; but does not operate as a statutory transfer.

Possession for a time exceeding the statutory limit, not only bars the remedy, but also extinguishes the right of the original owner (*p*). It has been said that the effect of the Act is to make a Parliamentary conveyance of the land to the person in possession, after the statutory period has elapsed (*q*): but though it is true that the possessory owner, after the statutory limit has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. If the Statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges; and wherever it was in settlement, his interest therein would constantly be varying according to the successive limitations of the settlement; but this is clearly not the operation of the Statute (*r*). A person who is in possession, but who has not acquired an indefeasible title under the Statute, has, as against every one but the rightful owner, an interest which may be inherited, devised, or conveyed (*s*); and though his possession may have lasted only for a year, he may, without further proof of title, maintain

(*p*) See sect. 34; *Scott v. Nison*, 3 Dra. & W. 383; *Burroughs v. Wright*, 1 J. & L. 290.

(*q*) *Per* Rake, B., 14 M. & W. 102; and see Lord St. Leonards' judgment in *Interpreted Society v.*

Richards, 1 Dra. & W. 230.

(*r*) See 1 Hayes Conv. 268; and an article xi. Jur. N. S. p. 151.

(*s*) *Det v. Jennings*, 3 O. & P. 99, 102; *Asher v. Whitlock*, L. R. 1 Q. B. 1, 2.

ejectment against a person who comes and turns him out (*t*); in other words, he may as against *strangers*, defend his right of possession until, by force of the Statute, it has ripened into a right of property. It has been held that in order that possession may confer a valid title upon a particular individual, it must have been either by the same person or by several persons claiming one from another (*u*); *e.g.*, that if twenty persons, unconnected with each other, had been in possession, each for one year consecutively, for twenty years, it would be impossible to say that any one of these twenty persons had acquired a title under the Act (*v*); and in a case of this description Lord Romilly, M.R., decreed possession to the *last* occupier, on the ground that, at Law, he might have maintained his possession against all but the true owner, who was barred by lapse of time (*y*). But this decision has been questioned (*z*); and the sounder view appears to be, that when the original rightful owner loses the possession, the first usurper of it becomes the rightful owner as against all the world except the original owner; and so on in the case of subusurpations; so that the actual occupier at the time of the extinction of the original owner's right, does not acquire an indefeasible statutory title, until the rights of all former usurpers (if any) of the possession have in like manner been extinguished.

In a late case at law (*u*) A. devised an estate of which he was only tenant by the curtesy, to trustees upon trust for his daughter R. for life, with remainder to W.; R. entered under the will and acquired a valid title as against the heir; but the Court of Queen's Bench held that, as against W., she was estopped from alleging that A. had no title, and

(*t*) *Doe v. Dyeball*, Mood. & M. 346.

(*u*) See *Hawkebee v. Hawkebee*, 23 L. J. Ch. 521; 11 Ha. 230; and see *Holmes v. Newlands*, 11 Ad. & E. 44; *Newlands v. Holmes*, 8 Q. B. 679.

(*v*) *Doe d. Carter v. Barnard*, 13 Q. B. 945; see judgment, *Dixon v.*

Gayfere, 17 Beav. 421.

(*y*) *Dixon v. Gayfere*, 17 Beav. 421.

(*z*) *Asher v. Whitlock*, L. R. 1 Q. B. 1, 4.

(*a*) *Board v. Board*, L. R. 9 Q. B. 48; but see *Paine v. Jones*, L. R. 18 Eq. 320.

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could not convert her limited interest under the will into a fee.

**Extinction of
rent.**

Rent payable out of land is extinguished by its non-payment during the statutory period; and time runs from the last actual receipt (*b*). But it must be borne in mind that where the ownership of land, subject to a rent, becomes severed, payment of such rent by the owner of any portion of the property will prevent the Statute from running in favour of the owners of the residue (*c*). So long as the owner of the rent receives it out of any portion of the land charged with its payment, there is no dispossession to create a bar under the Statute; and he may distrain on any portion of the land, notwithstanding that the owner or occupier of that portion has not paid the rent for more than twenty years (*d*). But the same rule does not apply to the payment of interest upon gross charges; thus, if a testator charges his estate with a sum of money, and devises it in several portions to different devisees, payment of the interest by any one of them will not prevent the Statute running in favour of the others (*e*).

**As to cases
between lord
of a manor
and copy-
holder.**

It has been held (*f*) that the Act applies as between the lord of a manor and a person entitled to a copyhold tenement, but who for twenty years has neglected to enforce his claim to be admitted, and has been out of possession; and it is conceived that the Act would operate conversely, in favour of the quasi-copyholder, in the event of his refusing or neglecting to take admittance, and retaining possession for the statutory period without any acknowledgment of the lord's title.

**Adverse pos-
session as**

As to the title which may be acquired as against the

(*b*) *Owen v. De Beauvoir*, 16 M. & W. 547; *De Beauvoir v. Owen*, 5 Exch. 166; *Lord Chichester v. Hall*, 17 L. T. 121 Q. B.

(*c*) *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. R. 251, 264.

(*d*) *Woodcock v. Titterton*, 12 W. R. 865.

(*e*) *Dickinson v. Teasdale*, 31 Beav. 511; 1 De G. J. & R. 52; compare *Cooper v. Cresswell*, L. R. 2 Ch. Ap. 112, 126; and see *Pears v. Laing*, L. R. 12 Eq. 41, and *vide supra* p. 396.

(*f*) *Walters v. Webb*, L. R. 9 Eq. 83; affirmed L. R. 5 Ch. Ap. 531.

Crown, and the Crown's grantees, by adverse possession, it may be sufficient to refer to the Acts of 21 Jac. I. c. 14; 9 Geo. III. c. 16; 24 & 25 Vict. c. 62 (*g*); and (as to Ireland) 48 Geo. III. c. 47. Such a title may, it seems, be forced on a purchaser (*h*). The Acts of 2 & 3 Will. IV. c. 71, and c. 100, seem to be binding on the Crown (*i*).

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Sect. 6.
against the
Crown.

As to title by adverse possession in lands belonging to the Duchy of Cornwall, we may refer to the Acts of 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; and 24 & 25 Vict. c. 62. s. 2, which assimilates the limitation applicable to actions and suits by the Crown to actions and suits by the Duke of Cornwall: a title acquired by adverse possession against the Duchy, may, it is conceived, be forced upon a purchaser (*k*).

As against
lands of the
Duchy of
Cornwall.

By the Real Property Limitation Act, 1874 (*l*), which comes into operation on the 1st January, 1879, the statutory periods of limitation will, as from the commencement of the Act, be still further reduced. Thus, no action or suit is to be brought for the recovery of any land or rent, but within 12 years from the time when the right first accrued (*m*); in cases of disability, a period of 6, instead of 10, years is to be allowed from the termination of the disability (*n*); but no time is to be allowed for absence beyond seas (*o*); and the utmost period to be allowed for disabilities is 30 years (*p*); the Act also fixes 12 years as a bar to the rights of remaindremen expectant on an estate tail, in the case of adverse possession under an assurance executed by the tenant in tail (*q*); and a like period as against a mortgagor, where the mortgagee has taken possession, and there has been no written acknowledgment (*r*); and also as against a mortgagee or

Real property
Limitation
Act, 1874.

(*g*) And see 1 Jarm. Conv. by S. 52; and *Doe v. Roberts*, 13 M. & W. 520; *Manning v. Phelps*, 10 Exch. 59.

(*h*) *Tutill v. Rogers*, 1 J. & L. 36, 72.

(*i*) See sect. 1.

(*k*) *Tutill v. Rogers*, 1 Jo. & L. 36.

(*l*) 37 & 38 Vict. c. 57.

(*m*) Sect. 1.

(*n*) Sect. 3.

(*o*) Sect. 4.

(*p*) Sect. 5.

(*q*) Sect. 6.

(*r*) Sect. 7.

~~CHAP. VIII.~~ person entitled to a charge on land, where no interest has been paid, or written acknowledgment given (s) ; and other portions of the Act of 3 & 4 Will. IV. c. 27, are either repealed or are to be read with reference to the alterations made by the recent Statute (t).

(s) Sect. 8.

(t) Sect. 9.

CHAPTER IX.

Chap. IX.

AS TO THE PRODUCTION AND EXAMINATION OF THE DEEDS.

1. *As to the place and time for, and expenses of, production of the deeds.*
2. *Production of—may be compelled, by whom.*
3. *Non-production of—how far important.*
4. *Examination of—matters to be observed in.*

Section 1.

(1.) EVERY vendor is presumed to have his title deeds in his own possession, or at any rate to have the power of producing them; and though he may only have a covenant for their production, he is still bound to produce them for the purpose of verifying the abstract (*a*); nor is the rule affected by the Vendor and Purchaser Act, 1874, which merely provides (*b*) that his inability to furnish a legal covenant for production is not to be a ground of objection to the title; and does not relieve him from his liability, in the absence of stipulation, to produce the deeds for comparison with the abstract. He may produce them either at his own known residence (*c*), or upon or in the immediate vicinity of the estate (*d*), or in London (*e*); and the purchaser in such cases pays for the necessary journeys of his own solicitor. If the deeds are in London, a country solicitor must employ a town agent to examine them, and cannot charge for a journey for that purpose; unless his client, (knowing the practice of the profession to be the other way,) requests him to undertake it (*f*): but a solicitor need not employ an

As to the place and time for, and expenses of, production of the deeds.

Vendor bound to produce deeds; where to be produced. Expenses of inspection.

(*a*) *Rippingall v. Lloyd*, 2 Nev. & Man. 410.

(*b*) 37 & 38 Vict. c. 78, sect. 2.

(*c*) Sug. 429.

(*d*) 1 Jarm. Conv. by S. 90.

(*e*) Sug. 429.

(*f*) *Alcop v. Lord Oxford*, 1 M. & K. 566; *Horlock v. Smith*, 2 Myl. & C. 528; *In re Tryon*, 7 Beav. 496.

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Sect. 1.

agent in a country town to examine deeds, but may send a clerk (g). Where all or any of the deeds cannot be produced at one of the usual places for production, the additional expenses of journeys thereby rendered necessary are borne by the vendor (h). Whether, however, the purchaser, having voluntarily incurred extraordinary expenses in obtaining an inspection of the deeds, can recover them from the vendor, may be doubted; his proper course, in such a case, is to refuse to go an unreasonable distance unless his extra costs are paid, or guaranteed. In estimating what are such extra costs, the vendor, it is conceived, may set off the travelling expenses which the purchaser would have incurred, if the deeds had been produced upon the estate, or at the vendor's residence, or in London.

Notice of
place of pro-
duction.

Deeds cove-
nanting to be
produced.

Grants from
Crown.

Instruments
on record.

Where the conditions of sale reserve to the vendor the option of producing the deeds at any one of several specified places, he must give to the purchaser reasonable notice of the place selected for the purpose (i): if he have only a covenant for production, the purchaser may, it seems, require him to produce them; or at least to send his own professional adviser for the purpose of enforcing production; as it might be refused to the purchaser's agent (k). In the case of a grant from the Crown, it is sufficient if the vendor's solicitor inform the purchaser where it may be seen (l); but the vendor must produce office copies or extracts of proved wills and records, and cannot require the purchaser to examine the originals at the public offices (m).

Examination
of deeds be-
fore investiga-
tion of title.

The purchaser may, as we have already seen, examine the deeds before laying the title before counsel; and, if the title prove bad, may, in the absence of any stipulation to the contrary, recover the expenses from the vendor; but, in order to do this, he must prove the existence of a valid con-

(g) See *Hoghea v. Wynne*, 8 Sim. 85.

(h) *S. C.*; *Sherpe v. Page*, Sug. 430.

(i) *Rippingall v. Lloyd*, 2 Nev. & M. 410.

(k) *S. C.*, 419.

(l) Sug. 431.

(m) Sug. 431; but as to furnishing copies on completion, *vide infra*, Ch. XIII.

tract for sale (n); and he should not, before the deeds are produced, prepare his conveyance (o).

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In a modern case (p), the examination of the deeds by a purchaser, who for five months had retained the abstract without delivering any requisitions, was held to be evidence of his having accepted the title. The case depended upon its special circumstances, and cannot be considered as establishing any general rule upon the subject; but it may render it occasionally prudent, in calling for the deeds, to do so with an express reservation of all pending and future questions on the title.

Whether an acceptance of the title.

(2.) *Production of deeds—may be compelled, by whom.*

Section

Where an estate is held in undivided shares, the owner of any share may, in Equity, compel the owner of any other share who holds the deeds relating to the common title to produce them for the satisfaction of a purchaser (q). Under the old practice, production was obtained by motion in Court, but now is obtained by summons in Chambers (r).

Production of deeds—may be compelled, by whom.
Who may compel production:—owner of undivided share.

So, where estates are held in severalty under separate titles created by a single instrument,—as in the case of a settlement, exchange, or partition (s),—the owner for the time being of any one such estate, or, it is conceived, of any part of it, may enforce production of such instrument. As between owners of several estates held under the same title,

Of estate held under several titles created by single instrument.

(n) *Gosbell v. Archer*, 4 Nov. & M. 485; 2 A. & E. 500.

(o) *Jarmaia v. Egelstone*, 5 Car. & P. 172.

(p) *Pegg v. Wiaden*, 16 Beav. 239.

(q) See 2 Mer. 490; *Burton v. Neville*, 2 Cox, 242; Sug. 443.

(r) See *Thompson v. Teuton*, 9 Ha. App. 49; 15 & 16 Vict. c. 86; Morgan's Ch. Act, p. 172.

(s) *Lord Banbury v. Briscoe*, 2 Ch. Ca. 42; Sug. 442; and see *Shore v. Collett*, G. Coop. 234; and *Att.-Gen. v.*

Lambe, 3 Y. & C. 162; S. C. at the Rolls, 12 Jur. 386; *Riccard v. Inclosure Commissioners*, 4 El. & B. 329: the order in *Harrison v. Coppard*, 2 Cox, 318, seems to have been by consent; and see *Elton v. Elton*, 11 Jur. N. S. 136; where the Court made it a term of the delivery of the partition deed to one of several parceners, that the deed itself should be enrolled in Chancery, and a covenant given for its production.

he who can get possession of the deeds has a right to retain them (t).

Purchaser of
portion of
estate.

Where a portion of an estate has been sold by the owner, who retains the deeds, the purchaser can, it appears, in Equity (u), enforce their production upon a resale (x); unless there was an understanding to the contrary; which would probably be implied from the circumstance of the title not being required upon the original sale.

Legal tenant
for life
entitled to
custody.

Where an estate is in settlement, the legal tenant for life is *prima facie* entitled to the custody of the title deeds (y); but, he cannot, it seems, insist on this right as against trustees who, though taking no estate, have active duties to perform, or where on other grounds (as, e.g., on account of a pending suit) it is more convenient that the deeds should remain in their possession (z), and if wanted for a proper purpose, their production can be enforced by a vested remainderman, or by a purchaser from him (a): but it seems that a contingent remainderman cannot enforce their production, even for the purpose of effecting a sale or mortgage (b), and it has been thought that, as a general rule, a vested remainderman cannot compel their production except under special circumstances (c), but, in a modern case, the Court, although admitting that the ordering of such production was not a matter of right, but rested in the discretion of the Court, and that it would not be directed unless for a purpose which the Court should deem to be proper, held the principle to be that the person so entitled in remainder or his mortgagee is entitled to, and may compel,

Whether
vested remain-
derman can
enforce pro-
duction.

(t) *Foster v. Crobb*, 12 C. B. 136.

(u) But not at Law, *Hug* 447, note; except in cases coming within the 14 & 15 Vict. c. 99, s. 6.

(x) *Fain v. Ayers*, 2 Sim. & St. 533; in this case the purchaser claimed to be entitled to a covenant for production under the covenant for further assurance, but this particular point was not decided.

(y) *Garner v. Hannington*, 22 Beav.

444.

(z) *Stanford v. Roberts*, L. R. 6 Ch. Ap. 307.

(a) *Lord Lempster v. Lord Pomfret*, 1 Dick. 238; *Davis v. Lord Dyser*, 20 Engv. 405; 21 Beav. 124.

(b) *Noel v. Ward*, 1 Madd. 322.

(c) See 2nd Ed. 327; *Shaw v. Shaw*, 12 Pri. 167; *Lord Lempster v. Lord Pomfret*, 1 Dick. 238.

such production; and if it be suggested that the purpose for which the documents are required is an improper one, the burthen of proving this lies on the the party resisting production; but that the right only exists where the title of the plaintiff to the interest which he claims in the land is free from all reasonable cause of litigation (*d*): and this seems to be the reasonable doctrine.

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* And it is conceived, that where, as sometimes happens, A. and B. jointly purchase property, taking the conveyance so as to give to B. merely an estate in remainder, B. has a general right to the production of the muniments of title.

Remainder-
man under a
purchase-
deed.

A mortgagee is not, in general, bound to produce the deeds until he is paid off (*e*), even although the devisee of the mortgaged estate may be ignorant of all particulars relating to the security (*f*): it has, however, been held that this immunity does not, as between mortgagor and mortgagee, extend to the mortgage deed itself; for this is as much evidence of the mortgagor's title to redeem, as it is of the mortgagee's estate (*g*): but in a later case (*h*) L. J. Giffard, in discharging an order for production, made by V.-C. James, laid it down that after the mortgage has become absolute, the mortgagor cannot see the title deeds which he has deposited with the mortgagee, except upon payment of principal, interest, and costs; and, apparently, no distinction was drawn between the mortgage deed and the earlier title deeds, as regards the application of the

Mortgagee
need not pro-
duce deeds
until paid off.

(*d*) *Davis v. Lord Dysart*, 1 Jur. N. S. 743; 20 Beav. 405; 21 Beav. 124.

(*e*) See *Sparks v. Montrion*, 1 Y. & C. 103; *Addison v. Walker*, 4 Y. & C. 447; *Greenwood v. Rothwell*, 7 Beav. 291; *Damer v. Lord Portarlington*, 15 Sim. 380; *Cannock v. Jauncey*, 1 Dro. 497, 507. Lord Kenyon is said to have advised a mortgagee to put his deeds into a box and

sit upon it, until the money was put into his hands; see 1 Y. & C. 107. The protection, of course, extends to drafts, and copies, &c., *Bycroft v. Sibel*, 20 L. T. 197.

(*f*) *Broigne v. Lockhart*, 10 Sim. 421; see *Crisp v. Platcl*, 8 Beav. 62.

(*g*) *Patch v. Ward*, L. R. 1 Eq. 436.

(*h*) *Chichester v. Marquis of Donegal*, L. R. 5 Ch. Ap. 497.

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rule (i). A mortgagee who has bought the equity of redemption, subject to a right of re-purchase reserved to the mortgagor and exercisable within a limited period, is within the rule; and need not, unless his money be tendered, produce the deeds for the satisfaction of an intending purchaser from the mortgagor (k). Since, however, a person can, as a general rule, give no right which he does not himself possess (l), the mortgagee of a person who would be liable to produce the deeds must himself, unless he can* protect himself by want of notice (m), produce them at the suit of those persons who could compel their production as against the mortgagor (n); but he would not be justified in so producing them except with the consent of the latter, or under an order of the Court (o).

Lien of solicitor.

So, the solicitor of a mortgagee has no lien upon the deeds, as against the mortgagor, to an amount exceeding what is due on the security (p). So, the lien of the solicitor of an executor upon title deeds of a testator's leaseholds, is subject to the amount (if any) due from his client to the testator's estate (q). If the solicitor of the mortgagor in-

(i) As to production of a mortgage deed in bankruptcy under the Act of 1861, see *re Marks Trust deed*, L. R. 1 Ch. Ap. 429; and as to production under the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 115, of documents subject to a solicitor's lien for costs, see *South Essex Estuary, &c. Co.*, L. R. 4 Ch. Ap. 215.

(k) *Smith v. Pauson*, 25 L. T. 40.

(l) See *Pelly v. Wathen*, 7 Ha. 351; 1 De G. M. & G., 16; *Gibson v. May*, 4 De G. M. & G. 512.

(m) See *Wallwyn v. Lee*, 9 Ves. 24; a case of a mortgage in fee by a person originally so seized, and who supposed an intermediate settlement; and see and consider *Heath v. Creak*, L. R. 10 Ch. Ap. 22; see, too, *Joyce v. De Moleyns*, 2 J. & L. 374; *Francis v. Francis*, 2 De G. M. & G. 73, 76; 5 De G. M. & G. 108; but

see *Newton v. Newton*, L. R. 4 Ch. Ap. 497.

(n) *Halls v. Margrave*, 4 Beav. 119; and see *Ilrey v. Ferrera*, *ib.* 97; also a singular case of *Muston v. Bradshaw*, 10 Jur. 402; 15 Sim. 192; where it was held that a purchaser could not, on the ground of the vendor's wife having possessed herself of the deeds, make her a defendant to a suit for specific performance; and see *Rumbold v. Fortreath*, 3 K. & J. 44.

(o) *Lambert v. Rogers*, 2 Mer. 490. See *Gough v. Offley*, 5 De G. & B. 658.

(p) *Hollis v. Claridge*, 4 Taunt. 807; see *Wakefield v. Newton*, 6 Q. B. 276; *Rider v. Jones*, 2 Y. & C. C. C. 329; and *Pelly v. Wathen*, 1 De G. M. & G. 16; *Hop v. Liddell*, 7 De G. M. & G. 331.

(q) *Turner v. Latta*, 7 De G. M. & G. 243.

duce the solicitor of the mortgagee to part with the deeds, by a verbal undertaking to pay a sum claimed to be due for costs, such undertaking will be enforced summarily upon motion (r); and it has been held that the lien of the mortgagor's solicitors upon the engrossment of the reconveyance was not prejudiced by their sending it to the mortgagee's solicitors, with a request that they would hold it for them subject to the lien; and a purchaser from the mortgagor was restrained from proceeding at Law for the recovery of the deed (s).

A mortgagee who consents to a sale by the Court must bring the deeds into Court in the usual way (t): and it is conceived that, in an ordinary case, a mortgagee who has countenanced a mortgagor in selling under the expectation of his concurrence, would not be allowed to stop the sale by refusing to produce the deeds before actual payment (u).

Exceptions from rule.

A mortgagee who has, even although insane, destroyed (x), or has negligently lost (y) the muniments of title, will, it seems, be compelled to replace such as can be replaced; and as respects originals, which cannot be replaced, will be required either to give an indemnity, or to make compensation, for the damage thereby done to the estate; but a mortgagee taking the same care of the deeds forming his security as he took of his own, ought not, it would seem, to be severely dealt with if they are accidentally lost (z). His bond has been held a sufficient indemnity to the owner of the equity of redemption (a); and if such a bond, and a reconveyance, be executed by the mortgagee, the mortgagor can be compelled to pay the amount due (b).

Liability of mortgagee for loss or destruction of deeds.

(r) *In re Gee*, 2 Dowl. & L. 997; see, in Equity, *Gilbert v. Cooper*, 15 Sim. 343, reversed 647.

(s) *Watson v. Lyon*, 7 De G. M. & G. 238; see too, *Newton v. Beck*, 3 Hurl. & N. 220; 4 Jur. N. S. 340.

(t) *Livesey v. Harding*, 1 Beav. 343.

(u) *Sue Crosse v. Reversionary Society*, 3 De G. M. & G. 712.

(x) *Hornby v. Matchan*, 16 Sim.

325; *Brown v. Sewell*, 11 Ha. 49.

(y) *Lord Middleton v. Elliot*, 15 Sim. 531.

(z) *Woodman v. Higgins*, 14 Jur. 846, V.-C. K. B.

(a) *Skelmardine v. Harrop*, 6 Madd. 39; and see a form of bond, *ib.* 41, n.

(b) *Stokes v. Robson*, 19 Ves. 385; *Smith v. Bicknell*, 3 V. & B. 51, n.; *Skelmardine v. Harrop*, *ubi supra*.

**Chancery
Statute**

**Production of
Court Rolls.**

The 15 & 16 Vict. c. 51 (e) contains provisions for securing to the owners of lands enfranchised under the Copyhold Enfranchisement Acts, the production of the Court Rolls of the manors whereof the lands are holden; and the 31st General Rule of Hil T. 16 Vict. (d), provides for the order upon the lord of a manor for the usual limited inspection of the Court Rolls on the application of a copyhold tenant being made absolute, upon an affidavit that the tenant has applied for and been refused inspection.

**Statutory
right to pro-
duction.**

We may here refer generally to the powers which recent Statutes (e) have conferred upon Courts of Law to compel production and inspection of documents, wherever Equity would grant discovery; and we may also refer to the power which the Court of Chancery has, under the Companies Act, 1862 (f), after a winding-up order has been made, to compel the production of deeds or other documents relating to the company (g).

(3.) *Non-production of deeds—how far important.*

Section 3.

**Non-produc-
tion of deeds
—how far im-
portant.**

**Importance of
non-produc-
tion of deeds.
May affect
purchaser
with notice of
their deposit.**

The non-production of the deeds is material, not only as it deprives the purchaser of the usual means of verifying the title deduced upon the abstract, but as inducing a suspicion that they may have been deposited by way of equitable mortgage: it has even been held, on a sale of a public-house in London, that their non-production amounted to notice to a mortgagee of such a deposit with the brewers who supplied the house (h). This decision has been disapproved of (i): and has been thought to depend upon the presumed notoriety of the practice of London publicans so to deposit their deeds, and upon the fact of the mortgagee having been aware that

(e) Sects. 20, 21.

(d) 1 El. & El. 34, App. IX.

(e) See 14 & 15 Vict. c. 99, s. 6;
15 & 16 Vict. c. 55, s. 18; 17 & 18
Vict. c. 125, s. 50; 23 & 24 Vict.
c. 128; and *vide* *supra*, Ch. XVII., s. 5,
and cases there cited.

(f) 25 & 26 Vict. c. 88, s. 115.

(g) See *re South Essex Estuary &c.*
Co., L. R. 4 Ch., App. 215.

(h) *Whitford v. Jordan*, 1 Y. & C.
302.

(i) See 4 Y. & C. 502; Sug. 767.

the publican was indebted to the brewers : in fact, the Court considered that there was wilful blindness, the security having been taken for the repayment, not of a contemporaneous advance, but of a sum already due (*k*) : however, in a modern case, it was held by Sir L. Shadwell, V.-C., that the omission to ask, for the deeds was sufficient to postpone a mortgagee who took a conveyance of the legal estate by way of security for a pre-existing debt, although it did not appear that he was aware of the mortgagor being indebted to the prior incumbrancer (*l*).

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(4.) *Examination of deeds—matters to be observed in.*

Section 4.

In the examination of the abstract with the documents, the most scrupulous care is requisite on the part of the solicitor. The object of the examination is to ascertain, 1st, that what has been abstracted is correctly abstracted ; 2ndly, that what is omitted is clearly immaterial ; 3rdly, that the documents are perfect, as respects execution, attestation, indorsed receipts, registration, stamps, &c. ; and 4thly, that there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, &c., &c., calculated to excite suspicion (*m*). Anything out of the ordinary course—such as the unusual position of the indorsed receipt (*n*)—should be made the subject of inquiry. Every part of every document ought to be read through, especially the covenants for title, &c., in a conveyance or mortgage. Notice of an incumbrance is equally notice whether contained in one or in another part of a deed (*o*) : and if an important point be overlooked, the purchaser, after the conveyance is executed and the purchase-money is paid, will have no remedy against

Examination
of deeds—mat-
ters to be ob-
served in.

Points to be
attended to in
comparing
abstract with
the deeds.

(A) 1 Ph. 255.

(l) *Worthington v. Morgan*, 16 Sim. 547 ; 13 Jur. 316 ; where it appears that the security was for money previously due ; and see *Hewitt v. Loosemore*, 9 Ha. 449 ; *Peto v. Hammond*, 30 Beav. 495 ; but see *Agra Bank v. Barry*, L. R. 7 E. & Ir. Ap.

135 ; and *vide infra*, Ch. XV. ss. 3 and 5.

(k) See *Kennedy v. Green*, 3 Myl. & K. 679.

(n) See *Kennedy v. Green*, 3 Myl. & K. 679, and the judgment in *Green-slade v. Dore*, 1 Jur. N. S. 294, 30 Beav. 234.

(o) See *Smith v. Capron*, 7 Ha. 189.

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the vendor unless it falls within the covenants for title; and this, apparently, even although the abstract may have been incorrect (p). Perhaps few of the most important duties of a solicitor are so frequently performed in a perfunctory manner.

**Erasures and
interlineations.**

We may here remark, as connected with the present subject, that erasures and interlineations in a *deed* are to be presumed to have been made prior to, or at the time of, its execution (q); as, on any other supposition, a crime must be presumed to have been committed (r): but, in the absence of proof to the contrary, erasures and interlineations in the face of a will are presumed to be made *after* its execution (s); and also after the execution of a codicil, which does not refer to them (t). It seems that unattested alterations in a will dated before, but coming into operation after, the late Wills Act are presumed to have been made before the Act (u).

(p) See *M'Culloch v. Gregory*, 1 K. & J. 291.

(q) *Doe v. Catmore*, 16 Q. B. 745.

(r) *Per* V.-C. W. in *Williams v. Ashton*, 1 J. & H. 115, 118.

(s) *Doe v. Palmer*, 16 Q. B. 747; *Cooper v. Bockett*, 4 Moore, P. C. 419; *Greville v. Tyler*, 7 Moo. P. C. 320; *Freeman v. Stegell*, 13 Jur. 1030 Q. B.; *Simmons v. Rudall*, 1 Sim. N. R. 115, 136; *Gunn v. Gregory*, 17 Jur. 520; 3 De G. M. & G. 777; *Re*

White, 6 Jur. N. S. 808; and see *William v. Ashton*, 1 Johns & H. 115, 118, and statement of the rule in the judgment.

(t) *Rowley v. Merkin*, 6 Jur. N. S. 1165. Alterations in a soldier's will which was signed by him while he was on actual military service are presumed to have been made during the continuance of such service, *re Tweddell*, L. R. 3 P. & D. 204.

(u) *Re Streater*, 28 L. J. Prob. 50.

CHAPTER X.

Chap. X.

AS TO MATTERS ARISING BETWEEN DELIVERY OF ABSTRACT
AND PREPARATION OF CONVEYANCE.

1. *Time, when essential at Law and in Equity.*
2. *Objections to title—negotiations upon and waiver of—when possession taken amounts to waiver.*
3. *General rights and liabilities of purchaser in possession.*
4. *Vendor in possession—alteration of property by, may avoid contract.*
5. *As to entry and possession by railway companies before completion.*

(1). AT LAW, the time fixed for completion is of the essence of the contract (a); and the purchaser may recover his deposit unless the vendor can deduce and verify a marketable title and give a conveyance at the time agreed on (b); if no time be fixed, a reasonable time must be allowed (c); and it has been held that a condition that the purchase-money shall be paid on a certain day, does not amount to a stipulation that the title shall be made out on or before that day (d). Where fiduciary vendors in effect undertook to procure the sanction of the Court of Chancery to the sale within a specified period, it was held that this was a condition precedent which, not being performed, avoided the contract (e); so, where it was stipulated that the purchaser should pay a further sum of money provided certain paving

Section 1.

Time, when
essential at
Law and in
Equity.
Time essential
at Law;

(a) *Berry v. Young*, 3 Esp. 640, n.;
Stowell v. Robinson, 3 Bing. N.C. 928;
Marshall v. Powell, 9 Q. B. 779, 791;
Hanslip v. Padwick, 5 Exch. 623.

(b) Sug. 259.

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(c) *Sansom v. Rhodes*, 8 Moo. 544.

(d) *S. C.*; *see quere.*

(e) *Purcher v. Gardner*, 19 L.J. N.S.
C. P. 63; 8 C. B. 441.

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Sect. 2.*

works were completed by the vendor, within a specified time, the vendor, having made default in consequence of the bad weather, was held disentitled to recover the additional purchase-money (*f*).

how far essential in Equity.

In Equity, however, although unreasonable delay will of itself conclude either party, the Court will relieve against, or enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion, or for any of the steps towards completion, if it can do justice between the parties (*g*); and if there is nothing in the express stipulations of the agreement, or the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in Equity time is not of the essence of the contract (*h*). This equitable doctrine has, of course, no application where time has been made of the essence of the contract by express agreement (*i*); or where, from the nature of the property or other circumstances, it is clear that such must have been the intention of the parties (*k*).

As where vendor incurs liability by keeping property;

For instance, on an agreement, by a tenant at will of a public house, for the sale of the possession, trade, and goodwill, at a fixed sum, and of the stock and furniture at a valuation, possession to be taken and the money paid on a given day, the delay of a single day on the part of the purchaser in having the valuation completed, and in taking possession and paying the purchase-money, was held to relieve the vendor from the contract: inasmuch as he incurred fresh liabilities by retaining the premises, and the stock in the meantime varied (*l*).

(*f*) *Maryon v. Carter*, 4 Ca. & Pa. 295; and see Sug. 259.

(*g*) See Lord Cairns, C., in *Tilley v. Thomas*, L. R. 3 Ch. Ap. 67.

(*h*) Per Thomas, L. J., in *Roberts v. Berry*, 3 De G. M. & G. 234.

(*i*) *Houghton v. Harrington*, 21 Deav.

24.

(*k*) Sug. 290; *Lennon v. Napper*, 2 Sch. & Lel. 623; *Roberts v. Berry*, 10 Deav. 31; 3 De G. M. & G. 234; *Perkins v. Thorold*, 16 Deav. 69, overruling *A. C.*, 2 Sim. N. E. 1.

(*l*) *Cockle v. Tili*, 1 Russ. 276.

So, upon the sale of a public house as a going concern, time is of the essence of the contract; and if the vendor cannot, by the day appointed for the completion of the purchase, procure a transfer of the license under the Licensing Act, the purchaser may repudiate the contract (*m*).

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So, the fluctuating value of the property may alone show that time was to be of the essence of the contract: as upon an agreement for the sale of foreign stock (*n*), or of a mining lease (*o*), or of a reversion, which may become an estate in possession during the delay, and the sale of which generally evidences immediate want of money (*p*), or a life annuity, or life estate, which may determine by the death of the *cestui que vie* (*q*).

or property is
of fluctuating
value;

or of a deter-
minable
character;

So, where the property is of a wasting character, as, *e.g.*, a leasehold for a short unexpired term (*r*).

or of a
wasting char-
acter;

So where the purchaser evidently requires the property for his residence (*s*), or for some other immediate purpose (*t*).

or is evidently
required at
once;

So, where the vendors, (being beneficially interested,) are a fluctuating body (as in the case of a dean and chapter), where delay may give the purchase-money to persons other than those who signed the contract (*u*).

or where the
vendors are a
fluctuating
body.

(*m*) *Sutton v. Mapp*, 2 Coll. 556; 9 Geo. IV. c. 61; *Day v. Lohr*, L. R. 5 Eq. 836; *Claydon v. Green*, L. R. 2 C. P. 511; *Cowles v. Gale*, L. R. 7 Ch. Ap. 12, following *Day v. Lohr*; see, too, sect. 9 of 32 & 33 Vict. c. 27, regulating the transfer of licences; and see now 25 & 26 Vict. c. 94, sect. 40.

(*n*) *Dolores v. Rothchild*, 1 Sim. & St. 590.

(*o*) *Macbride v. Washes*, 22 Beav. 533.

(*p*) See *Newman v. Rogers*, 4 Bro. C. C. 391; *Spurrier v. Hancock*, 4

Ven. 667, 672; *Hipwell v. Knight*, 1 Y. & C. 401, 416; *Wyll v. Bp. of Exeter*, 1 Pri. 292, 298.

(*q*) See *Withy v. Cottle*, Turn & R. 78.

(*r*) *Hudson v. Temple*, 29 Beav. 534, 543.

(*s*) *Gelge v. Duke of Montrose*, 26 Beav. 45; *Levy v. Linda*, 3 Mer. 84; *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61; *Webb v. Hughes*, L. R. 10 Eq. 281.

(*t*) *Wright v. Howard*, 1 Sim. & St. 190; *Parker v. Frith*, *ib.* 199.

(*u*) *Curter v. Dean of Ely*, 7 Sim. 211.

**Chap. X.
Book I.**

Modern decisions tend to render time material.

And the tendency of modern decisions has been to hold persons concerned in contracts relating to land, bound, as in other contracts, to regard time as material; and this principle has been applied with the greater strictness where the property was connected with trade (x).

Exercise of right of presumption.

So an option to purchase under a right of pre-emption must be exercised within the prescribed period (y).

Purchase-money wanted to discharge incumbrances.

So, the circumstance of the purchase-money being evidently required for payment of incumbrances, is important; especially if the rate of interest which they bear exceed that which the purchaser is to pay during delay (z).

Private unexpressed motives for purchase.

But the private motives which may have induced a party to enter into a contract, unless expressed in the agreement, or such as might be presumed from the general apparent circumstances of the case, do not make time essential; *e.g.*, the unexpressed intention to reside immediately upon the estate (a): where, however, the motive is of material importance—as in the case of the intention to reside—although not disclosed in the contract, it would, it appears, be sufficient to bind the vendor to the time named in the contract, if communicated at or within a reasonable period after its execution (b).

(x) *Per* Wigram, V.-C., in *Walker v. Jeffreys*, 1 Ha. 348; and see *Wright v. Howard*, 1 Sim. & St. 190, *Parker v. Frith*, *ib.* 199, n.; *Codrile v. Till*, 1 Russ. 376; *Sparrow's case*, cited 2 Scr. & L. 601; *Seaton v. Mapp*, 2 Coll. 556, and Lord Cranworth's decision in *Parkin v. Thorold*, 2 Sim. N. R. 1, which, however, went very far, and has since been overruled; 16 Beav. 55; *Wells v. Maxwell*, 32 Beav. 408; *Gedye v. Duke of Montrose*, 25 Beav. 45; and see case cited *supra*, p. 418.

(y) *Brooks v. Gorred*, 3 K. & Jo. 608; 2 De G. & Jo. 62, 66; *Alderson*

v. White, 3 Jur. N. S. 1316; *Austin v. Tawney*, L. R. 2 Ch. Ap. 143; *Rovlands v. Evans*, 8 Jur. N. S. 88; *Lord Ranelagh v. Melton*, 10 Jur. N. S. 1141.

(z) *Popham v. Eyre*, Loft, 786; Sug. 262; *Anon.*, cited 3 Scr. & L. 604.

(a) See *Boehm v. Wood*, 1 Jac. & W. 422; *Dyer v. Hargrave*, 10 Ves. 508.

(b) See 7 Ves. 279; and *Nobis v. Lord Kilmorey*, 1 De G. & S. 444; and see *Gedye v. Duke of Montrose*, 25 Beav. 45.

A stipulation that time shall be of the essence of the contract as respects the delivery of objections to the title, raises a presumption that it is not to be essential as regards the completion of the purchase; and this presumption is strengthened by a provision for the payment of interest by the purchaser, in the event of the purchase not being completed by the day named (*c*).

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Time made essential as to objections to title is not thereby made essential as to completion of purchase.

Nor is a mere undertaking that possession (which in such a stipulation means not merely actual possession, but possession with a good title shown (*d*),) shall be delivered on a certain day, of itself binding in Equity (*e*).

Undertaking to deliver possession.

In all the above cases the delay may be supposed to have arisen from the state of the title, or otherwise without any wilful or gross neglect by the party in default; gross or wilful neglect (*f*), however, by either party, will, in any case, entitle the other party to avoid the contract in Equity; *e.g.*, where the vendor, although urged by the purchaser to make out his title, takes no steps to do so, the purchaser immediately upon the expiration of the time fixed for completion may rescind the agreement (*g*).

Effect of wilful delay;

Where time is of the essence of the contract, the purchaser should not be content with merely asking the vendor to take the necessary steps towards completing the purchase, but should diligently press him to do so (*h*); and a purchaser who takes no steps to enforce the contract within a reasonable time, will be left to his remedies at Law; and the strong

of protest without active pressure.

(*c*) See *Wells v. Maxwell*, 32 Beav. 408; and compare *Webb v. Hughes*, L. R. 10 Eq. 281.

(*d*) *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61.

(*e*) See *Boehm v. Wood*, 1 Jac. & W. 419; and see *Webb v. Hughes*, L. R. 10 Eq. 281, where the negotiations were continued by the purchaser after the date on which he had stipulated for possession. As to what is delivery of possession, see *Lake v.*

Dean, 28 Beav. 607, and *vide infra*.

(*f*) See *Lennon v. Napper*, 2 Sch. & Lef. 682; *Roberts v. Berry*, 3 De G. M. & G. 289; *Tilley v. Thomas*, L. R. 3 Ch. Ap. 61.

(*g*) *Lloyd v. Collett*, 4 Bro. C. C. 409, cited 5 Ves. 737; *Warde v. Jeffery*, 4 Pri 294.

(*h*) *Brooke v. Garrod*, 3 K. & Jo. 608, 616; *Williams v. Glenton*, L. R. 1 Ch. Ap. 200, affirming M. R., 34 Beav. 523.

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tendency of modern decisions is to diminish the time allowed to either party for enforcing his rights under the contract (i). But, of course, where the contract, though incomplete, has been acted on, and either party has substantially had the benefit contracted for, time does not so readily run (k).

When title
must be shown
in Equity ;

Where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient, upon a bill for specific performance being filed by the vendor, if a good title be shown at the date of the decree (l); or of the investigation at chambers, if the title is referred to chambers.

and at Law.

And, at Law, where no time is fixed for completion, and the purchaser does not require the title to be produced, and none is produced before an action has been commenced by the vendor, it is sufficient if the latter perfect his title at any time before the trial (m); but if a title be produced, and prove defective or be not properly verified, or, *à fortiori*, if the vendor, on being required to produce a title, altogether neglect to do so, the production of a perfect title before trial is insufficient (n).

Time may be
limited by
notice,

But although time may not originally have been of the essence of the contract, either party may, by proper notice, bind the other to complete within a reasonable specified period (o).

allowing a
reasonable
period.

The notice should, at least as a matter of precaution, be in writing, and should allow a reasonable time for completion: what time can be so considered, must greatly depend upon the circumstances of the particular case. Three days' notice by a vendor would be too short (p); even six weeks has been

(i) *Vide infra*, Ch. XVIII. ; 6 Ha. 213.

(k) *Shary v. Milligan*, 22 Beav. 606.

(l) *Vide infra*, Ch. XVIII. ; 6 Ha. 213.

(m) *Thomson v. Miles*, 1 Exp. 184.

(n) *Vide infra*, Ch. XVII.

(o) *Stewart v. Smith*, 6 Ha. 223, n. ; see *Hoppy v. Hill*, 3 Sim. & St. 29 ; *Webb v. Hughes*, L. R. 10 Eq. 281, and cases cited in next notes.

(p) See *Reynolds v. Nelson*, 6 Madd. 18 ; Sug. 268.

held to be insufficient (*q*); so, a week's notice by a purchaser, within which time the vendor was required to prove a disputed legitimacy, was held too short (*r*); so, two months' notice by a purchaser, where the vendor was taking active steps to remove the only two remaining objections to the title, but for the removal of which longer time was obviously wanted (*s*); but, two months' notice by a purchaser, within which time the vendor was required to remove an objection to the title depending upon a defective execution of a power, appears to have been considered sufficient in a modern case, which was, however, decided upon another point (*t*). In another modern case, where a delay of two months had occurred in procuring the execution of the conveyance by certain parties, a ten days' notice by the purchaser was considered sufficient (*u*). In a later case, a notice requiring the vendor to complete the title within fourteen days after the day originally named for completion was considered unreasonable (*x*); but in a still later case, a month's notice by a purchaser after two months' delay was considered sufficient; although the performance of the contract depended upon the vendor being able to enter into a complete arrangement with third parties; but the decision in this case rested in a great measure upon the fluctuating character of the property (*y*).

It is not, as a general rule, essential to the binding effect of a vendor's notice, that he should, at the expiration of it, return or tender the deposit (*z*); nor, on the other hand, where the purchaser's notice has expired, is he bound to bring an action for his deposit (*a*).

As to the
deposit.

But a purchaser cannot, in general, determine the contract

Purchaser
cannot re-

(*q*) *Pegg v. Widen*, 16 Beav. 239.

(*r*) *King v. Wilson*, 6 Beav. 124.

(*s*) *Wells v. Maxwell*, 32 Beav. 408;
see too, *McMurray v. Spicer*, L. R. 5
Eq. 527.

(*t*) *Southcomb v. Bishop of Exeter*,
11 Jur. 727; 6 Ha. 213.

(*u*) *Benson v. Lamb*, 9 Beav. 502.

(*x*) *Parkin v. Thorold*, 16 Beav. 59;

see S. C., 2 Sim. N. R. 1; and see
Nott v. Richard, 4 W. R. 269; 22
Beav. 307.

(*y*) *Macbride v. Weekes*, 22 Beav.
538; see too, *Haywood v. Cope*, 25
Beav. 140.

(*z*) Sug. 269.

(*a*) *Southcomb v. Bishop of Exeter*,
11 Jur. 727; 6 Ha. 213.

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rescind without
notice.

without due previous notice (b); although notice even of immediate determination would, it is conceived, be so far material as that it would more strongly impose upon the vendor the necessity of using expedition in proceeding to enforce the contract (c): and where the vendor has positively refused to comply with the purchaser's valid requisition, the latter may, after allowing the vendor a short time for considering whether he will persist in his refusal, or, perhaps, even without giving any further notice, rescind the contract (d); and the same principles would, it is conceived, apply to notices by a vendor.

Time when
held to remain
at option of
purchasers.

Where a railway company had power at any time within seven years to take land for the purposes of the undertaking and agreed to purchase land, and to pay interest upon the purchase-money from the day they should commence their works on the land until the purchase-money should be paid, it was held that the vendor could not enforce specific performance; the company not having commenced their works, and the seven years limited by the Act remaining unexpired (e).

Time,
although
essential, may
be enlarged or
waived:

And time, although of the essence of the contract by original agreement, or made imperative in Equity by subsequent notice, may be enlarged or waived, by subsequent agreement, or by conduct of the parties amounting to waiver (f).

by proceeding
in purchase;

Thus, if a purchaser proceed in the purchase after the expiration of the time fixed by the contract (g), or limited by his notice (h), it amounts to waiver (i): the same rule holds good as regards a vendor (k).

(b) *Taylor v. Brown*, 2 Beav. 180;

Wood v. Mackay, 5 Ha. 158.

(c) *See Gunt v. Homfray*, 5 Ven. 818.

(d) *Nott v. Riccard*, 22 Beav. 307.

(e) *Bodington v. Great Western R. Co.*, 13 Jur. 144.

(f) *Osaka v. Thodgy*, 13 Sim. 206;
Notes & Lord Kilmeray, 1 Do G. &

Sma. 444.

(g) *Boyes v. Liddell*, 6 Jur. 725.

(h) *Webb v. Hughes*, L. R. 10 Eq. 281;
see too *Flint v. Woodin*, 9 Ha. 618.

(i) *King v. Wilson*, 6 Beav. 124;
and see *Ex parte Gardner*, 4 Y. & C. 503.

(k) *See Pegg v. Widen*, 16 Beav. 239.

So, where a purchaser made no demand of the possession of the purchased premises until a quarter before twelve at night on the day fixed for completion—part of the property consisting of cottages let to weekly tenants—this was held, at Law, to be a waiver of the condition as to time (*l*).

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or by neglect
to require
possession.

At Law, time, if fixed by an instrument under seal, cannot be enlarged by an instrument not under seal (*m*); so, if fixed by a written agreement not under seal, it cannot be enlarged by word of mouth (*n*); but, even at Law, a distinction is drawn between an alteration of the contract by enlarging the time, and mere forbearance to insist upon its performance at the time originally fixed (*o*); and, in one case, where a lease stipulated that the rent should be ascertained by valuation, and valuers were duly appointed but never fixed the rent, and after the lessor's death a parol arrangement was made between his representatives and the lessee, that if the latter paid an occupation rent neither party should call upon the other to perform the stipulations of the lease, it was held that this arrangement did not conflict with the terms of the deed, and that there was a good consideration for the promise to pay (*p*).

How not en-
larged at
Law.

A conditional written waiver by a purchaser of his previous notice of abandonment, will be construed strictly against the vendor (*q*).

Conditional
waiver.

And where the conditions provide for delivery of the abstract at a certain time, the purchaser waives them in Equity by receiving the abstract after that time: or even, it would seem, by perusing it unnecessarily, or retaining it, when delivered under circumstances which prevent its immediate

Time for de-
livery of ab-
stract, how
waived in
Equity.

(*l*) *Palmer v. Temple*, 1 Per. & D. 379; see p. 381; 9 Ad. & E. 508; and see *Carpenter v. Handford*, 8 B. & C. 575; 3 Man. & R. 93.

(*m*) *Rippingall v. Lloyd*, 2 Nev. & M. 410.

(*n*) *Stowell v. Robinson*, 3 Bing. N. C. 928; *Stead v. Dawber*, 10 Ad. & E.

57; *Marshill v. Lynn*, 6 Mea. & W. 109.

(*o*) *Oyle v. Earl Vane*, L. R. 2 Q. B. 275; on app. L. R. 3 Q. B. 272.

(*p*) *Nash v. Armstrong*, 7 Jur. N. S. 1060.

(*q*) See *Stewart v. Smith*, 6 Ha. 222, n.

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rejection (r). So, a vendor who receives and entertains the purchaser's requisitions delivered after the time specified, waives his right (unless expressly reserved) to insist on the conditions (s); and, as a general rule, either party relying on time being essential, as a defence to a specific performance, should make the point promptly (t).

And a condition for delivery of the abstract on a certain day, is waived in Equity by a purchaser who does not ask for it within a reasonable time before the day fixed for its delivery (u): the same rule would, no doubt, apply to the production of evidence, &c.: and it is conceived that a waiver of time as respects matters (such as the delivery of the abstract, &c.) which *must* necessarily precede completion by a considerable period, would, in general, amount to a waiver of the time (if any) fixed for completion.

Time waived
by not object-
ing to
certain or
highly prob-
able delay in
completion.

So, a stipulation that time shall be of the essence of the contract, is waived by a purchaser who receives, and retains without objection, an abstract upon the face of which it appears that a title cannot be made within the time fixed for completion (x); or who, without an objection on that specific ground, proceeds with the purchase under a knowledge that there is no reasonable probability of the title being perfected in time for completion; as when it depends upon the result of a hostile chancery suit (y).

Protest.

It seems doubtful whether a mere protest against the delay will save the benefit of the stipulation (z): it is conceived that, until the expiration of the time limited for completion, a purchaser may safely, and is indeed bound to,

(r) See *Scot v. Slade*, 7 Ven. 278;
Hippell v. Knight, 1 Y. & C. 401;
and *Magenis v. Fallon*, 2 Moll. 576.

(s) *Oshes v. Pike*, 11 Jur. N. S.
606.

(t) *Mauro v. Taylor*, 8 Ha. 62, 3
Mac. & G. 713.

(u) *Supra*, and see *Seg. V. & P.*
14th Ed., p. 266.

(x) See *Hipwell v. Knight*, 1 Y. &
C. 401, 419.

(y) *Pinche v. Curtiss*, 4 Bro. C. C.
332; *Wood v. Bernal*, 19 Ven. 220;
and see *Williams v. Glenton*, L. R.
1 Ch. Ap. 200; 34 Beav. 522.

(z) See *Seg. 365*, but see *Williams*
v. Glenton, *id supra*, and p. 421.

proceed in the matter so long as a reasonable probability exists of the title being perfected in time; taking care, nevertheless, to protest in writing against the delay, and to give notice of his intention to insist on his strict rights. When the time has expired, or when previously it becomes certain that the title cannot be perfected in time, he should take no further steps in the matter, but should in writing rescind the contract; and then, if inclined to give the vendor the opportunity of completing within a reasonable period, all subsequent communications should be expressed to be without prejudice to the notice of rescinding, and should take the shape of mere negotiations for a fresh agreement.

It may be observed, that even in a contract for, or connected with, the sale of land, the term *month* means *primâ facie* a lunar month; although it may be construed a calendar month, if, from the context, or from the surrounding circumstances, at the time of making the contract, such appears to have been the intention of the parties (a). In Acts of Parliament the term month is to mean a calendar month, unless words are added showing that a lunar month is intended (b); and every Act is now to be deemed a public Act, unless the contrary be expressly provided (c).

"Month"
means *primâ facie* a lunar month.

(2.) *Objections to title;—negotiations upon and waiver of;—when possession taken amounts to waiver.*

Section 2.

We have already (d) adverted to the effect which negotiations with respect to the title may have upon the vendor's rights under the ordinary conditions limiting a time for taking objections, and giving him the power to rescind the contract.

Objections to title;—negotiations upon and waiver of;—when possession taken amounts to waiver. Effect of negotiations upon condition as to objections.

(a) *Lang v. Gale*, 1 M. & S. 111; *Simpson v. Margitson*, 11 Q. B. 23; and see Lord St. Leonard's remarks, V. & P. 257, on *Hipwell v. Knight*, 1 Y. & C. 401.

(b) 13 & 14 Vict. c. 21, s. 4. This enactment is not retrospective.

(c) Sect. 7.

(d) *Supra*, p. 161.

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Solicitor purchasing cannot object to title which he accepted for his client.

It may be observed that a solicitor purchasing from his client, cannot insist upon any objections to the title which he—or his then partner in the case of a firm—considered unimportant when acting for the client upon his original purchase (e). The rule, however, it is conceived, would not preclude objections founded upon alterations which had been made in the Law in the interval between the purchase and the resale. Subject to this qualification, it would seem to be also applicable to counsel.

Danger of frivolous objections and requisitions ;

Care should be taken not to make frivolous or unnecessary objections or requisitions: objections clearly frivolous, made and persisted in, would certainly indispose, even if they did not prevent (f), a Court of Equity from enforcing the contract at the suit of the purchaser. It perhaps seldom happens, upon the perusal of an abstract, that his advisers confine their requisitions within the strict limits of their client's rights, or within the limits prescribed by the conditions. Points which could not perhaps be absolutely insisted on, but which are yet of real moment, may often, if urged, be conceded, either from courtesy, or as the price of the purchaser's relinquishing requisitions which, although capable of being enforced, are yet of less practical importance. It is, however, material that no untenable requisition should be tenaciously adhered to: for instance, where a purchaser had required unnecessary evidence, and had in consequence been refused that to which he was really entitled, he was not allowed his costs, although he obtained a decree for specific performance (g). In a modern case, when a purchaser from a mortgagee alleged that the latter was unable to deliver possession, and insisted on the concurrence of the mortgagor, although the mortgagee offered to deliver possession, it was held, in a suit for specific performance, that the mortgagee was entitled to a decree with costs, if *then* able to deliver possession; and the Court refused to inquire whether, when his offer to deliver possession was

(e) *Boquer v. Simpson*, Taml. 69.

(f) *Seq.* 352.

(g) *Newall v. Smith*, 1 Jac. & W.

263.

not accepted, he was able to perform it (*h*). It seems difficult to support the latter branch of the decision.

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And, on the other hand, a purchaser should be careful not to hold back important objections or requisitions; if he knowingly do so, the question may arise whether he has not impliedly waived them (*i*); and where a purchaser puts a vendor to expense in complying with requisitions, &c., and then takes and insists on a fatal objection, which he originally had the means of discovering, it seems probable that if a bill were filed by the vendor for specific performance and dismissed, the Court would not dismiss it with costs, without allowing to the vendor, by way of set-off, the expenses so incurred by him (*k*); although it does not appear that he could otherwise recover them (*l*).

or of withholding objections, &c.,—whether it amounts to waiver.
As to costs.

And, though it is not, perhaps, absolutely necessary that a purchaser's original requisitions should go beyond matters arising out of the title as abstracted, it is always desirable that he should, in the first instance, make any requisition which he considers of importance as to the special form of the conveyance, or as to the concurrence therein of parties other than the vendor. In a recent case (*m*), it appears to have been considered, though it was not necessary to decide the point, that if the purchaser insists on a requisition as to matter of conveyance which the vendor refuses to comply with, and the purchaser on this ground, after due notice, rescinds the contract, the Court cannot, if the requisition is well founded, enforce specific performance at the suit of the vendor.

As to requiring concurrence of other parties.

We have already considered (*n*) what expressions will

Purchaser's *prima facie*

(*h*) *Allen v. Martin*, 5 Jur. 239, R.
(*i*) See Lord St. Leonards' remarks on *Magennis v. Fallon*, V. & P. 347; and *Stanton v. Tattersall*, 1 Sm. & G. 529; *Alexander v. Crobie* 1 Jo. & Lat. 666.
(*k*) See and consider *Derrell v.*

Lord Bolton, 18 Ves. 505, 514, 515.
(*l*) See Sug. 363, and *vide infra*.
(*m*) *Denny v. Hancock*, 1 R. 6 Ch. Ap. 1.; see judgment of L. J. James p. 13.
(*n*) *Supra*, p. 145, *et seq.*

**Chap. X.
Book 2.**
right to a
good title.

negative the purchaser's *prima facie* right to a marketable title: he will, however, be bound, not only by express stipulation, but also by a clear notice of the state of the title given to him before entering into the agreement (o).

May be
waived.

But a purchaser may, after the contract, either expressly or impliedly, waive, either wholly or in part, his right (whether it be absolute or qualified) to a marketable title, or to the usual evidences thereof.

Purchaser not
bound by
counsel's
opinion, un-
less he adopt
it.

Effect of ac-
ceptance of
title subject to
specified re-
quisite on.

We have seen that a purchaser is not bound by his counsel's approval of the title; but that if counsel waive a requisition or objection, the purchaser, adopting his opinion and dealing with the vendor on that view, cannot afterwards repudiate it (p). Where a purchaser, having taken several objections, expresses himself willing to accept the title upon a specified objection being removed, this waiver of the other objections is merely conditional upon the removal of the specified objection; so that, if such objection be not removed and a bill be filed against him for specific performance, he is entitled to a general reference as to title (q); and although the objection taken by the purchaser may not be his true reason for refusing to complete the purchase, the Court will not pry into his motives, but will simply decide whether the objection is tenable or not (r). Acceptance of the title, as abstracted, is no waiver of the purchaser's right to have the abstract verified (s): nor will the Court imply a waiver of any objection which is not clearly raised by the contents of the abstract (t): nor does a purchaser, by waiving his right to an abstract, necessarily waive objections to the title which are otherwise known to him (u): nor does acceptance

Acceptance of
title as ab-
stracted not a
waiver of the
right to have
it verified.

(p) *Ogilvie v. Foljambe*, 3 Mer. 64.

(q) *Supra*, p. 309.

(r) *Lesturgeon v. Martin*, 3 Myl. & K. 285; *Sweet v. Myers*, 8 Jur. N. S. 688.

(s) *Denny v. Hancock*, 14 E. 6 Ch. Ap. 1, 10.

(t) *Smith v. Hunt*, 2 Myl. & C.

217.

(u) *Blacklow v. Lewis*, 2 Ha. 47; *Att.-Gen. v. Sitwell*, 1 Y. & C. C. C. 570; and see *Bentley v. Crum*, 17 Beav. 204; *Tarquand v. Rhodes*, 37 L. J. Ch. 880.

(v) *Sidcotiam v. Barrington*, 3 Jur.

947.

of the title bind the purchaser, where the vendor conceals some material fact (*x*). Where a purchaser of a freehold and copyhold estate accepted the title, subject to the production of "a declaration of identity of lands mentioned in the deeds to those now sold," this was held to be a waiver of his original right to have the tenure of a particular part distinguished (*y*); and where a purchaser, in his answer to a suit for specific performance, admitted as to his belief that at the date of the contract the vendor had a title, this was treated as an admission of the fact, which he could not afterwards question (*z*).

And waiver need not be expressed: it may be implied from either letters or mere acts of the party (*a*).

Waiver may be implied:—

For instance, where a purchaser who had been let into possession—but which, as it was according to the contract, does not appear to be very material—and who had retained the abstract for a considerable period without objection, and had altered and let the premises, wrote a letter to his solicitor for the purpose of its being communicated to the vendor, and therein expressed his "vexation at the delay which had happened about payment," and his gratification "at the liberality and patience shown" to him, this was held to amount to an admission that the title was approved (*b*): and the same decision was come to in a later case, where a purchaser took possession under the contract, paid part and gave security for the residue of the purchase-money, and mortgaged her interest under the contract (*c*). So where a purchaser had been in possession of the estate, and had retained the abstract for five months without making any requisition as to title; and then, while under notice by the vendor to complete within fourteen days, merely required the production of the deeds,

From apologies for non-payment.

From payment for, and dealing with property.

From retention of the abstract without making requisitions.

(*x*) *Boufield v. Hodges*, 33 Beav. 90.

(*y*) *Dawson v. Brinkman*, 3 De G. & S. 376; 3 Mac. & G. 53.

(*z*) *Phipps v. Child*, 3 Drew. 709.

(*a*) *Infra*, Ch. XVIII.

(*b*) *Margravine of Anspach v. Noel*, 1 Madd. 310.

(*c*) *Haydon v. Bell*, 1 Beav. 337.

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he was, under the special circumstances, held to have thereby accepted the title as abstracted (*d*).

Approval of
preparation of
conveyance,
when a waiver.

The preparation of the conveyance cannot, in general, be much relied on as evidence of waiver (*e*): where, however, in the case of a lease, the lessee, without previously requiring a title to be shown, approved of a draft lease furnished by the lessor, and took possession under the contract, he was held to have waived all objections to the title (*f*): so, where a purchaser of a leasehold house, after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor's title, the Court seems to have considered that he had waived its production (*g*): so, where requisitions on the title were made and answered, and the purchaser sent to the vendor the draft conveyance without prejudice to the requisitions, it was held that the purchaser, having taken no objection to the vendor's replies, and the only negotiation pending between the parties being as to the payment of the purchase-money, must be deemed to have accepted the title (*h*); subject, of course, to the requisitions being complied with, so far as the vendor, by his replies, had agreed to comply with them.

Conditional
waiver.

At any rate, where the purchaser prepares and tenders the draft conveyance, this cannot, as a general rule, amount to waiver of objections on the title, except conditionally upon the vendor's acceding to the proposed form of conveyance (*i*).

Attempt to
resell.

The fact of an intended lessee having advertised the property for sale, although not considered conclusive, was relied on in a modern case, as one among other evidences of his

(*d*) *Pegg v. Wisden*, 16 Beav. 239; & G. 665; 2 Sm. & G. 469.
vide supra, p. 409.

(*e*) See Sug. 345; *Burroughs v. 397*; *Smith v. Cupron*, 7 Ha. 191.

Oakley, 3 Sw. 159; *Harwood v. Bland*, 1 Fla. & Ke. 349.
(*h*) *Sweet v. Meredith*, 8 Jur. N. S. 637.

(*i*) *Warren v. Richardson*, You. 1; (*i*) *Luky v. Higgs*, 1 Jur. N.S. 200.
and see *Kimpton v. Sodd*, 4 De G. M.

having waived the production of the lessor's title (*k*); but, in general, no great importance as regards waiver can be fairly attached to the mere circumstance of the purchaser having attempted to resell the property; except that the actual or attempted resale of merely a *portion* of the estate, may, as between the original vendor and purchaser, show that the latter did not consider such portion material to the enjoyment of the residue (*l*). Where the purchaser has actually contracted to resell, or has published conditions with a view to a resale, the form of the contract or conditions may be material: as it may be fairly presumed that he can neither have intended on the one hand to insist as against the original vendor upon any objections, which he may have guarded against on the resale, nor on the other hand, to waive any to which the title would then remain liable. If, under the sub-contract or conditions, the sub-purchaser is to be bound to take the title as it stands, this would, it is conceived, be strong evidence that the original purchaser had waived all his objections to the title.

Possession of the property by the purchaser is the fact most frequently relied on as furnishing evidence of waiver of objections to the title (*m*): its importance, however, depends upon the circumstances attending its acquisition and retention. Possession ;

Where the possession is taken after the delivery of the abstract, and not in pursuance of any special provision of the contract, it is *prima facie* a waiver of all objections appearing on the abstract; and it lies on the purchaser to rebut this presumption (*n*). taken after delivery of abstract.

The strongest case against the purchaser is, where he forcibly, or without the consent of the vendor, and without Forceible possession.

(*k*) *Simpson v. Sadd*, 4 De G. M. & G. 665 ; 2 Sm. & G. 469.

(*l*) See *Knatchbull v. Grueber*, 1 Madd. 170 ; 3 Mer. 124.

(*m*) *Fludyer v. Cocker*, 12 Ves. 25.

27 ; *Fleetwood v. Green*, 15 Ves. 594 ;

Binks v. Lord Rokeby, 2 Sw. 222, 226 ;

Haydon v. Bell, 1 Beav. 337 ; *Deller v. Simonds*, 5 Jur. N. S. 997.

(*n*) *Bown v. Stenson*, 24 Beav. 631.

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being authorized by the contract so to do, takes possession : forcibly taking possession, was held in an early case to amount to a waiver of an objection for want of title to an important part of the estate (o), though compensation appears to have been allowed.

Possession
 taken under
 contract, or
 with vendor's
 leave.

Possession, however, if taken in accordance with the clear intention of the parties as evidenced by the terms or subject-matter of the contract (p), or with the consent of the vendor (q), is not in itself, as a general rule, any waiver of the purchaser's right to a good title, or of any pending negotiations upon the title: where, however, the purchaser was, upon his own application, let into possession, this was held to be a waiver of an objection (*viz.*, a right of sporting over the property) which appeared upon the face of the abstract delivered three months previously, but which had not been made the subject of remark by the purchaser or his solicitor (r). It is material here to observe, first, that the purchaser's general requisitions upon the title appear (s) to have been made prior to the application for possession; and secondly, that the objection was of a permanent character, and not probably capable of removal: the case may, perhaps, be held to show that the acceptance of possession amounts to an implied waiver of any known objection, which the purchaser knows, or may reasonably believe, cannot be removed; or has not formed part of his previous requisitions upon the title (supposing any requisitions to have been already made). In a later case, the taking of possession, though held to be a waiver of all objections appearing on the abstract, did not preclude the purchaser from objecting to the title upon grounds which subsequently came to his knowledge *aliunde* (t); so, also, it was held to be no waiver,

(o) *Calcraft v. Roebuck*, 1 Ves. Jun. 159; *Simpson v. Sadd*, *ubi supra*, n. (k). 221.

(p) *Dixon v. Astley*, 1 Mor. 134; (r) *Burnell v. Brown*, 1 Jac. & W. 168.
 (q) *Stevens v. Cuppy*, 8 Russ. 171.

(s) *Vancouver v. Bliss*, 11 Ves. 458, 464; (t) See 1 Jac. & W. 171.
Darroughs v. Oakley, 3 Sw. 631.

where there was a serious misdescription of the property, not discovered until after possession was taken (*u*).

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Where purchasers retained possession for two years, without requiring an abstract, which, according to the agreement was to be paid for by themselves, if required, this was held to be a waiver of their right to investigate the title (*x*). And where a purchaser has taken possession of, and enjoyed the subject-matter of, the contract, the Court will as against him, make every presumption in favour of the validity of the contract (*y*).

Long retention of possession.

The grant of a lease by the purchaser to a tenant in possession is equivalent to taking possession (*z*): so is acceptance of the keys of a house (*u*).

What amounts to possession.

And, as it is not so universally the custom to require the lessor's title on the grant of a lease, as it is to require the title on the purchase of freeholds, smaller circumstances may satisfy the Court that the right has been waived in the former case than would be sufficient to induce the same conclusion in the latter (*b*); and the same principle would apparently apply to the case of a purchase of leaseholds in cases not within the Vendor and Purchaser Act, 1874.

Distinction between purchase of leaseholds and of freeholds.

Lastly, we may remark that a personal undertaking by the vendor's solicitor to do certain acts for clearing up the title, will not be enforced by the Court under its summary jurisdiction (*c*).

Undertaking by solicitor to perfect title.

(*u*) *Turgand v. Rhodes*, 37 L. J. Ch. 890.

(*x*) *Sibbald v. Lourie*, 18 Jur. 141; *Wallis v. Woodyear*, 2 Jur. N. S. 179.

(*y*) *Port of London Assurance case* 5 De G. M. & G. 465

(*z*) *Ex parte Sidebotham*; *In re*

Barrington, 1 Mont. & A. 655.

(*a*) *Guest v. Homfray*, 5 Ves. 823.

(*b*) *Simpson v. Sed*, 3 Eq. R. 263; 4 De G. M. & G. 665; 2 Sm. & G. 469.

(*c*) *Peart v. Bushell*, 2 Sim. 38; *vide supra*.

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Section 3. (3.) *As to the general rights and liabilities of a purchaser in possession (d).*

General rights
and liabilities
of purchaser
in possession.

Where the purchaser is already in possession as tenant at will the purchase contract puts an end to the tenancy (e); and even in the case of a purchaser being tenant for a term of years, it has been said that the relation of landlord and tenant is determined by a contract between the parties for the sale of the estate (f). But at Law a lease is not affected by a contract which depends upon a good title being deduced (g); and it is conceived that where a purchaser, who is in possession as tenant, and entitled to require a valid title, acts pending the completion of the purchase merely as he might properly have done if the tenancy were still subsisting, his possession will not be deemed an acceptance of the title.

Purchaser au-
thorized to
enter into pos-
session and
acting as
owner does
not waive ob-
jections.

It appears to be clear that a purchaser who is authorized to enter into possession of the estate, may, to some extent, act as owner without thereby accepting the title. He may take a fall of underwood in due course (h): so, in the case of a timber estate, a fall of timber would, it is conceived, be no necessary acceptance of the title, although it might be restrained at the suit of the vendor upon the ground of its diminishing his security for the purchase-money (i): nor does it appear that any act of management of the estate in a due course of husbandry, or in a fair exercise of the supposed right of ownership (k), would be of importance: thus it has been held by K. Bruce, V.-C., that, upon a purchase of four acres of land, stubbing up an osier bed of nine perches, levelling the land, and filling up a pond, did not amount to a waiver of title (l).

As by altering
property.

(d) *Et vide* *infra*, Ch. XVII. n. 2.

(e) *Daniel's v. Davison*, 16 Ves. 252, 253.

(f) *S. C.* *sed quare*.

(g) *Doe v. Stanion*, 1 Mee. & W. 695, 701; *Tarte v. Darby*, 15 M. & W. 601; Sug. 178.

(h) *Barrourgs v. Oakley*, 3 Sw. 170.

(i) *Supra*, p. 251.

(k) 1 You. 506.

(l) *Osborne v. Harvey*, 1 Y. & C. C. C. 116; and see *Turquand v. Rhodes*, 37 L. J. Ch. 830.

In fact, Lord St. Leonards states without qualification (*m*), that "acts of ownership after an authorized possession are of no importance:" the reported cases, however, do not seem to support so wide a proposition; nor can it be maintained upon principle (*n*). If the purchaser of a residential property, let into possession pending the investigation of the title, were to fell the ornamental timber, or were otherwise to destroy or permanently alter for the worse any of those features of the estate, which conferred upon it an adventitious value, it cannot be supposed that, at the present day, the Courts would allow him to get rid of his bargain upon the ground of the title being not strictly marketable.

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Whether universally so.

At any rate, it appears that a distinction must be made between important acts of ownership committed previously to, and those committed after, the discovery of a serious objection to the title (*o*); for acts which materially affect the property are justifiable only under the purchaser's belief that he is in fact the owner. And it is conceived that a purchaser in possession may so act as to preclude himself from ultimately rejecting the title, without necessarily waiving his right to have the title perfected to the best of the vendor's ability; and also that a distinction must generally be made between acts affecting residential or building property and acts affecting mere agricultural land.

Whether so after discovery of defect in title.

And where a purchaser, who had been long in possession of the property, and had taken frivolous objections to the title, refused to receive any further explanations, and yet retained possession, he was held to have accepted the title (*p*).

Retention of possession and refusal to discuss the title.

An act which amounts to a waiver of the purchaser's right to reject a defective title, is not necessarily a waiver of his right to compensation for the defect (*q*).

Waiver of objections but not of compensation.

(*m*) V. & P. 344.

(*n*) See *Donovan v. Fricker*, Jac. 165; *infra*, p. 438; *Wallis v. Wood-year*, 2 Jur. N. S. 179.

(*o*) *Dixon v. Astley*, 1 Mer. 135; see 1 You. 507.

(*p*) *Hall v. Laver*, 3 Y. & C. 196.

(*q*) See *Culcraft v. Roebuck*, 1 Ves.

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Modification
waiver.

So, acts by a purchaser in possession, which might otherwise have been considered as a waiver of objections to the title to a portion of the estate, have been held to be modified by his continuing to ask for the title (*r*).

Purchaser re-
jecting title
may be
ejected with-
out compensa-
tion for ex-
penditure.

A purchaser may (*s*), and as a matter of prudence should, decline to take possession while the title is in dispute, except under a special agreement: for, if he take possession and then reject the title, he may be ejected by the vendor (*t*); and cannot at Law claim any allowance for improvements or repairs; nor will Equity afford him any relief unless there has been fraud on the part of the vendor (*u*). Upon taking possession, he becomes, in the absence of any special agreement (*x*), tenant at will to the vendor, although there is a stipulation for payment of interest until completion (*y*); and the right of the vendor to recover possession by ejectment will be subject to the 7th section of 3 & 4 Will. IV. c. 27 (*z*). When a purchaser in possession under the contract is advised to rescind the contract, and assert a paramount title to the property, he is not bound to give up possession before asserting such paramount title by making a formal entry (*u*).

What allow-
ances made
when vendor
sues in
Equity

If the contract be rescinded in Equity, even on the ground of fraud in the purchaser (*b*), the Court will, in general, direct an allowance to be made to the purchaser for sub-

Jun. 221; *Hughes v. Jones*, 3 De G. F. & Jo. 307, 316. The clerk of the vendor's solicitor has no implied authority to bind the client to allow compensation; *Burnell v. Brown*, 1 Jac. & W. 168.

(*r*) See 1 Madd. 170; *Knatchbull v. Gruber*, 3 Mer. 124. And see as to the taking of possession being an act of part performance of the contract, *infra*, Ch. XVIII.

(*s*) *Fortabon v. Shirley*, 2 Sw. 223.

(*t*) And the agreement will amount to an acknowledgment of the vendor's title: *Doe v. Burton*, 16 Q. B. 807.

(*u*) Sug. 847; *Nicholson v. Wordsworth*, 2 Sw. 345.

(*x*) *Standers v. Musgrave*, 6 B. & C. 521.

(*y*) *Doe v. Caperton*, 9 Car. & P. 112; *Doe v. Chamberlaine*, 5 M. & G. 11; *Doe v. Jackson*, 1 B. & C. 448; *Doe v. Leeds &c.*, 16 C. B. 706; and see *Doe v. Neeld*, 3 Man. & G. 271 (case of exchange). As to what will determine the tenancy, see 4 Jarm. Conv. by S. 463.

(*z*) *Doe v. Rock*, 4 Man. & G. 30; *supra*, p. 384.

(*a*) *Southcomb v. Bishop of Exeter*, 6 Ha. 213.

(*b*) See *Donovan v. Fricker*, Jac. 165; *Nelson v. Clarkson*, 4 Ha. 104.

stantial improvements and repairs (c): this allowance, however, when the sale is set aside at the suit of the purchaser will not extend to improvements, or even repairs—except such as are essential to the preservation of the property (d)—made subsequently to the discovery of the matter on which he grounds his right to relief; nor to a greater extent than is specifically prayed by the bill (e).

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for repairs,
improvements, &c.

On the other hand, it has been decided, that, where the title proves defective, an action for use and occupation will not lie against the purchaser for the time during which he has been in possession under the contract (f): but if, after the contract is clearly abandoned, he retain possession, he will be liable, in respect of such subsequent occupation (g). Where a purchaser retained possession for eight years, without payment, and refused either to accept the vendor's defective title, or to abandon the agreement, and upon a bill being filed by the vendor, and the Master reporting against the title, still refused to accept it, he was ordered to account for the rents and profits and to pay the costs of the suit (h).

Purchaser not
liable for use
and occupation,
if title bad,
until it is re-
jected.

Where C., a sub-purchaser from B., entered into possession, and then, pending a suit for specific performance by B. against A. (the original vendor), was induced by A. to give up possession under a mistake of facts, it was held that, upon a decree being made for specific performance of the contract between A. and B., and a conveyance being executed by A., C. could maintain use and occupation for the time during which he had been out of possession (i): but it appears to have been subsequently held in the same case, that although the equitable owner might maintain use and occupation under the circumstances, yet such action would

Purchaser may
maintain use
and occupation
in respect
of his equi-
table title,
when.

(c) Sug. 254.

(d) Sug. 254.

(e) See *Edwards v. M'Leay*, 2 Sw. 287.

(f) *Winterbottom v. Ingham*, 7 Q. B. 611; and see *Hearn v. Tomlin*, 1 Pca. N. P. O. 253; *Kirtland v. Poun-*

sett, 2 Taunt. 145; *Seaton v. Booth*, 4 Ad. & E. 528.

(g) *Howards v. Shaw*, 8 M. & W. 118.

(h) *King v. King*, 1 Myl. & K. 442;

Hope v. Hope, 22 Boav. 365.

(i) *Hull v. Vaughan*, 6 Pri. 157 and see 7 Q. B. 617.

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not lie against the vendor, because the relation of landlord and tenant was never contemplated between the parties (*k*).

Liability of
purchaser in
respect of al-
teration of
premises.

Where a contract was rescinded upon the ground of fraud in the purchaser, the latter was compelled to reinstate a private house which he had converted into a shop (*l*): the fraud is not noticed by Lord St. Leonards, in stating the case (*m*); and if, as may therefore be supposed to be his opinion, this was not the ground of the decision, the decision seems to be an authority for this very reasonable proposition, viz.: that alterations by the purchaser, although not in themselves a waiver of title, will yet deprive him of the aid of a Court of Equity in rescinding the contract, if they are such as change the nature or character of the property, and do not admit of reinstatement: or if he declines or is unable to reinstate them.

His lien on
estate for pur-
chase-money,
paid.

If the contract be rescinded through want of title or other default on the part of the vendor, the purchaser, if he have paid all or any part of the purchase-money, will have a lien for it, with interest (*n*), on the estate, even although he may have taken, an independent security (*o*), and also for his costs of suit (*p*): but no such right exists where the contract is void on the ground of illegality (*q*); or where the purchaser is by Law disqualified from holding such an interest in real estate (*r*); or where he himself abandons the contract (*s*).

In a modern case, where the vendor of an estate con-

(*k*) See 7 Q. B. 618; *Tew v. Jones*, 13 M. & W. 12; *Turner v. Cameron's Co.*, 5 Exch. 932.

(*l*) *Donovan v. Fricker*, Jac. 165.

(*m*) *Sag*. 254, 255.

(*n*) *Torrance v. Bolton*, L. R. 14 Eq. 124, 136; *affd.* L. R. 8 Ch. Ap. 118.

(*o*) See *Lacen v. Mertins*, 3 Atk. 1, 4; *Mackreth v. Symmons*, 15 Ves. 345; *Ozenham v. Eadale*, 3 Y. & J. 262; *Buryess v. Wheat*, 1 Ed. 211; *Wythes v. Lee*, 2 Jur. N. S. 7; 3 Drew. 396.

(*p*) *Middleton v. Magray*, 2 H. & M. 233; *Turner v. Marriott*, L. R. 3 Eq. 744; and see *Thomas v. Buxton*, L. R. 8 Eq. 120; *Torrance v. Bolton*, *ubi supra*.

(*q*) *Ewing v. Osbaldiston*, 2 Myl. & C. 53, 88.

(*r*) See and consider *Harrison v. Southcote*, 2 Ves. Sen. pp. 389, 393; *Mackreth v. Symmons*, 15 Ves., see 337.

(*s*) *Dinn v. Grant*, 5 De G. & S. 451.

tracted to be sold executed a mortgage upon it, of which notice was duly given to the purchaser by the mortgagee, who did not interfere with the contract, and the purchaser, who was allowed to take and retain possession, paid several instalments of the purchase-money as provided by the contract, but eventually (on grounds which were adjudged sufficient) rejected the title, it was held that the purchaser had a lien upon the estate for the payments made and interest, which might be enforced against the mortgagee (*t*).

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(4.) *Vendor in possession, by altering property, avoids the contract.*

Section 4.

Vendor in possession, by altering property avoids the contract. Material alteration of property by vendor may avoid contract.

Any alteration of the subject-matter of the contract by the vendor, in any particular which does not admit of compensation or reinstatement, as the fall of ornamental timber (*u*) or other trees, will entitle the purchaser to abandon the contract. The felling of ordinary timber by the vendor pending the completion of the contract may be a matter for compensation (*x*): and, as we have already seen, a vendor may, in due course of husbandry, cut coppice wood and get in crops, but in such a case the net profits will belong to the purchaser (*y*).

And in a case between vendor and purchaser the Court, it is conceived, would consider whether the trees destroyed were in fact, or might reasonably be considered, ornamental; and would not—as in cases between tenant for life and remaindermen—regard as ornamental, only trees which were planted or left for ornament (*z*).

Felling ornamental timber.

We (*a*) have already considered the relative rights of the vendor and purchaser in the several events of the estate

Alterations in value of estate, or failure of consideration.

(*t*) *Ross v. Watson*, 11 H.L. Ca. 672.
(*u*) *Magennis v. Fallon*, 2 Moll.
588.

and *vide supra* p. 247.

(*z*) See 2 Moll. 588; *Marker v. Marker*, 9 Ha. 1; and see *Webster v. Donaldson*, 34 Beav. 541.

(*x*) *S. C.*

(*y*) *Poole v. Shergold*, 1 Cox. 273,

(*a*) *Supra*, p. 245, *et seq.*

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increasing or diminishing in value, or of the failure of the consideration for, or subject-matter of, the contract, before conveyance.

Section 5.

As to entry
and possession
by railway
companies be-
fore comple-
tion.

As to entry
and possession
by railway
companies.

(5.) *As to entry and possession by railway companies
before completion.*

Upon making
deposit, and
giving secu-
rity by bond.

By the clauses of the Lands Clauses Consolidation Act, 1845, which relate to the entry upon lands by the promoters of the undertaking (b), it is, in effect, provided, that the promoters shall not, without the consent of the owners (that is, all persons having any interest, although not in possession,) (c) and occupiers, enter upon any land (except for the purpose of making surveys and other similar purposes specified in the Act.) until they have paid or deposited the purchase-money or compensation for the same. If, however, before the amount of purchase-money or compensation has been determined by agreement, award, or a verdict, they are desirous of entering, they are enabled to do so, upon making such deposit and giving such bond by way of security as are specified in the 85th section of the 8 & 9 Vict. c. 18, as recently modified by the 36th section of the 30 & 31 Vict. c. 127. The valuation to be made by the surveyor appointed under the provisions of these Acts is to include the amount of all damage and injury, so far as capable of estimation (d); and the security must be for the value of *all* the land comprised in the notice of purchase given by the promoters under the 18th section, although the proposed entry be upon only a part of such land (e); and should be in the very terms of the Statute (f); and if the bond first given be informal, or insufficient, a second may be substituted for it (g). Before

^{*} (b) Sect. 84 to 92.

(c) *Inge v. Birmingham, &c. R. Co.*,
3 De G. M. & G. 658.

(d) 30 & 31 Vict. c. 127, s. 36.

(e) *Darker v. North Staffordshire R. Co.*, 2 De G. & S. 55; 5 R. Cas. 401;
and see *Hockins v. Phillips*, 5 Rail.
Ca. 560; 3 Exch. 168; and *Dakin v. London and N. W. R. Co.*, 3 De G. &

S. 414.

(f) *Poynder v. Great Northern R. Co.*, 2 Ph. 330; 5 R. Cas. 146; *Langham v. Same*, 1 De G. & S. 486; *Willey v. South Eastern R. Co.*, 1 M. & G. 58; 6 Rail. Ca. 100.

(g) *Willey v. South Eastern R. Co.*, 1 M. & G. 58.

the recent Statute, no prior notice to the landowner of the intention of the promoters to proceed under the 85th section of the Lands Clauses Consolidation Act appears to have been necessary (*h*); but now, by the 30 & 31 Vict. c. 127, s. 36, the company are bound to give to any party interested in, or entitled to sell and convey, the lands in question, and not consenting to the entry of the company, not less than seven days' notice of their intention to apply to the Board of Trade for the appointment of a surveyor (*i*): such a notice, however, does not amount to a contract binding them to take the property (*k*). The entry and deposit may be made at any time before the expiration of the period allowed for compulsory purchase (*l*); but an entry subsequent to the recent Statute cannot be made upon a previous valuation under the Lands Clauses Act (*m*): nor are the company justified in proceeding under the 85th section of that Act, unless there is an urgent necessity for immediate entry on the land (*n*); and if they avail themselves of their powers under this and the following sections, they cannot also enforce specific performance of an agreement previously entered into with respect to the same lands (*o*); the service of a notice to treat and entry into possession under the 85th section, being regarded as an abandonment by the company of their rights under the contract. It is conceived that if the company, having entered into a binding contract for the purchase of land, afterwards put in force their compulsory powers with respect to the same land, the landowner may, at his option, either enforce the contract, or allow the price to be determined by a jury or by arbitration, as he may deem most to his advantage.

The deposit is to remain as a security for the performance

Application,
&c., of de-
posit.

(*h*) *Bridges v. Wille, Somerset, and Weymouth R. Co.*, 11 Jur. 315; 4 R. Cas. 622.

(*i*) Prior to the recent Act, the appointment rested with two justices.

(*k*) *Grierson v. Cheshire Lines' Committee*, L. R. 19 Eq. 83.

(*l*) *Worsley v. South Devon R. Co.*,

20 L. J. N. S. 254, Q. B.; 15 Jur. 970.

(*m*) *Field v. Carnarvon and Llanberis R. Co.*, L. R. 5 Eq. 190.

(*n*) *S. C.*

(*o*) *Beilford and Cambridge R. Co. v. Stanley*, 32 L. J. Ch. 60; 2 J. & H. 746.

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of the bond, and is to be applied under the direction of the Court of Chancery (*p*); and it will not be paid to the company without notice to the landowner, although the purchase may have been completed by agreement, and the purchase-money paid (*q*); and he is entitled to his costs of appearance (*r*): he does not, however, seem to have any lien upon it for his costs payable by the promoters (*s*): nor can he oppose its repayment to the company, if he have repudiated the proceedings of which the original deposit, &c., formed a part (*t*).

Entry, what
is.

It has been held that the making of a permanent tunnel through the soil without disturbing the surface, is an entry upon or user of the land within the 85th section of the Lands Clauses Consolidation Act (*u*); so also is throwing an arch over the land (*x*). Placing waggons, rails, &c., on the land, with the consent of the tenant, has been held to be no entry (*y*); but if permanent injury is done, though the entry is with the tenant's consent, yet the owner may obtain an injunction (*z*). Where the entry was merely for surveying and setting out the line, and the company were no longer in possession, the Court refused an injunction (*u*).

Where land in
mortgage, de-
posit should
cover enforce-
able claims of
mortgagee.

Where the land is in mortgage, the deposit and bond should be sufficient to cover all claims which the mortgagee may be entitled to enforce; and in one case where the company had notice that land was subject to a mortgage, not payable till a future day, and paid the purchase-money into Court upon the ordinary valuation to the credit of the mortgagor, without communicating with the mortgagee, they were restrained

(*p*) Sect. 87.

(*q*) *Ex parte South Wales R. Co.*, 6 Rail. Ca. 151.

(*r*) See *ex parte Stevens*, 2 Ph. 772; see however, *Re Tottenham, &c. R. Co.*, 14 W. R. 669.

(*s*) *Ex parte Stevens*, 2 Ph. 772; 16 Sim. 165.

(*t*) *In re Fooks*, 2 Mac. & G. 357.

(*u*) *Ramsden v. Manchester and*

Altrincham R. Co., 5 Rail. Ca. 552; 1 Exch. 723.

(*z*) See *Pinchin v. Blackwall R. Co.*, 1 K. & J. 35.

(*y*) *Standish v. Mayor, &c., of Liverpool*, 1 Dra. 1.

(*z*) *Armstrong v. Waterford and Limerick R. Co.*, 10 Ir. Eq. R. 60.

(*a*) *Fooks v. Wills, Somerset, and Weymouth R. Co.*, 5 Ha. 199.

from proceeding with their works, though not from retaining possession of the land (b): so, in a recent case, where equitable mortgagees were not formally served with notice of the inquiry to assess damages, and took no part in it, and the amount of compensation awarded fell short of what was due on their security, it was held that they were in no way bound; and that, in default of payment, they were entitled as against the company and the landowner to a conveyance of the land comprised in their security (c).

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But where a person claims under a title altogether adverse to that of the parties with whom the company have contracted, Equity will not interfere, at his suit, to restrain the company from committing waste (d); in such a case the adverse claimant should bring an action of trespass or ejectment.

Where land claimed under an adverse title.

Any wilful entry by the promoters, without consent and before payment or deposit, is made the subject of a 10*l.* penalty: and the retention of possession after conviction in such penalty, renders them liable to a penalty of 25*l.* *per diem* (e): but the penalties are not incurred by an entry after payment or deposit made to or in favour of parties who were believed to be, but were not, actually entitled (f). In case of an unlawful refusal by the landowners or occupiers to give up possession or permit an entry, the promoters of the undertaking can claim the assistance of the sheriff (g): and a landowner who has by his silence and conduct encouraged a company to carry on their works, upon the supposition that they were entitled to enter and take the land in question, and who subsequently disputes the terms

Penalty on unlawful entry.

Remedy against landowner refusing possession.

(b) *Ranken v. East and West India Docks R. Co.*, 12 Beav. 298; but see *Williams v. S. Wales R. Co.*, where no difficulty appears to have been felt as to the jurisdiction to restrain the company from keeping possession.

(c) *Martin v. London, Chatham, and Dover R. Co.*, L. R. 1 Ch. Ap. 501.

(d) *Webster v. South Eastern R. Co.*,

1 Sim. N. R. 273; and see *Alston v. E. C. R. Co.*, 1 Jur. N. S. 1009.

(e) Sect. 89. See *Hutchinson v. Manchester R. Co.*, 15 M. & W. 314; and *Hutchinson v. East Lancashire R. Co.*, 3 Rail. Ca. 784.

(f) See last note.

(g) Sect. 91.

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of the contract, is not entitled to an interlocutory injunction to restrain them from so entering (h). Where a company, on a purchase, agreed with the landowner that, if they should require any additional land for the purposes of their railway, it should be sold to them at a stated price, it was held that they were authorized under the agreement to purchase additional land at any time within the statutory period for the completion of the works, although their compulsory powers had expired (i).

Whether compulsory powers can be exercised after time limited for completion of works has expired.

In a recent case, where a railway company, after the compulsory powers of their original Act had expired, obtained another Act authorizing additional works, it was held that a notice to treat, given under the former Act, was not available for the taking of land subject to the compulsory powers of both Acts (k). But the decision in this case was mainly rested on the ground, that there was no evidence that the land proposed to be taken was required for any specific purpose authorized by the former Act. The Court, however, was inclined to lay it down as a general rule, that where a railway company is limited in time for taking land by compulsion, and also for completing their works, the compulsory powers of purchasing should cease on the expiration of the period limited for the completion of the works (l).

Company after lawful entry cannot be ejected.

A company which has duly entered under the 85th section cannot be ejected by the landowner at the expiration of the time limited by the special Act for the exercise of their compulsory powers, although the amount of purchase-money remain unascertained, and the land be not conveyed (m): it

(h) *Greenhalgh v. Manchester and Birmingham R. Co.*, 3 Myl. & C. 784; 1 R. Cas. 399; *Swaine v. G. W. R. Co.*, 3 N. R. 109, 399; and see cases cited in *Daniell's Ch. Pr.* 4th Ed. p. 1505.

(i) *Bangley v. Midland R. Co.*, L. R. 3 Ch. Ap. 806.

(k) *Richmond v. North London R. Co.*, L. R. 5 Eq. 352; *affd.* L. R. 3 Ch. Ap. 679.

(l) *Per Cairns. L.-C.*, L. R. 3 Ch. Ap. 681.

(m) *Doe d. Armistead v. N. Stafford R. Co.*, 15 Jur. 944, Q. B.; 16 Q. B. 526; 20 L. J. 249; *Hudson v. Leeds and*

is for the landowner to take the initiative under the 68th section in order to have the amount ascertained (*n*).

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The owner of land of which a railway company has taken possession, whether under the 85th section or by agreement, has a lien upon the land for his unpaid purchase and compensation moneys, which the Court will enforce by sale, even though the railway is actually made and ready for traffic (*o*): and the fact of a deposit and bond having been made and given under the 85th section does not prejudice his lien for the excess of the purchase and compensation moneys over the sum deposited (*p*).

Lien on railway for unpaid purchase money.

Where a railway company purchased land by agreement with the landowner and entered into possession, but afterwards leased the line which they constructed to another railway company, the vendor was held entitled, in a suit for specific performance against both companies, to a declaration of lien for his unpaid purchase-money, and to have it enforced by a sale (*q*), and the appointment *ad interim* of a receiver (*r*). But the Court will not for the purpose of enforcing the lien restrain the company from running trains over the land until the sale is made (*s*).

Where land is taken by a railway company and the purchase-money is ascertained by arbitration under the

Landowners have no lien for costs of arbitration.

Bradford R. Co., 16 Q. B. 796; *Worsley v. S. Devon R. Co.*, 20 L. J. (Q. B.) 185; 17 Q. B. 840.

(*n*) See *Adams v. Blackwall R. Co.*, 2 Mac. & G. 130; 6 Rail. Ca. 271.

(*o*) *Wing v. Tottenham and Hampstead Jn. R. Co.*, L. R. 3 Ch. Ap. 740; *Walker v. Ware, Hadham, and Buntingford R. Co.*, L. R. 1 Eq. 195; 35 Beav. 52.

(*p*) *Walker v. Ware, Hadham, and Buntingford R. Co.*, *ubi supra*.

(*q*) *Bishop of Winchester v. Mid Hants R. Co.*, L. R. 5 Eq. 17.

(*r*) *Pell v. Northampton & Banbury R. Co.*, L. R. 2 Ch. Ap. 100; *Coxen v. Bognor R. Co.*, L. R. 1 Ch. Ap. 594; and see cases cited in next note.

(*s*) *Munns v. I. of Wight R. Co.*, L. R. 5 Ch. Ap. 414, reversing V.-C. James, L. R. 3 Eq. 653; see also *Lycett v. Stafford & Uttoxeter R. Co.*, 13 Eq. 261. See however *Earl St. Germans v. Crystal Palace R. Co.*, L. R. 11 Eq. 568, where the company was restrained from continuing in possession. See further on this subject *infra*, Ch. XIV. sect. 1.

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Lands Clauses Consolidation Act, 1845, the vendor is not entitled to a lien on the land sold for the costs of the arbitration payable to him by the company (*t*).

More notice
does not bring
land within
the 68th sect.

Lands included in the company's notice, but not actually taken or actually affected by the company, are not within the 68th section, and the landowner's remedy is under the preceding sections (*u*).

(*t*) *Earl Ferrers v. Stafford & Uttoxeter R. Co.*, L. R. 13 Eq. 524.

(*u*) *Burkinshaw v. Birmingham, &c., R. Co.*, 5 Exch. 475.

CHAPTER XI.

Chap. XI.

AS TO SEARCHES FOR AND INQUIRIES RESPECTING INCUMBRANCES.

1. *What inquiries should be made of vendor's solicitors ; and of supposed incumbrancers, trustees, and tenants.*
2. *What searches should be made for incumbrances,—law respecting judgments, &c.*
3. *Time for making searches and inquiries.*

(1). It has of late become a very usual course, to inquire of the vendor's solicitors, (as part of the general requisitions on the title,) whether they are aware of any judgment or other incumbrance affecting the property, or of any other matter not noticed in the abstract and affecting the vendor's ability to make a marketable title, subject only to the stipulations in the contract or conditions of sale ; and occasionally whether the property is held under the title abstracted and under no other title (a). Such an inquiry may often save much useless expense ; and a favourable reply not only adds to the security which the purchaser will derive from the searches of his own professional advisers, but will also remove any doubt as to his right to be paid for the preparation of the conveyance, if such searches disclose incumbrances which cannot be got in. The inquiry should specify any matter the existence of which is specially apprehended : and when there is reason to suspect the existence of any particular incumbrances, an application should be made to the supposed incumbrancers : the motive for the application should, of course, be stated, and the

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What inquiries should be made of vendor's solicitors ; and of supposed incumbrancers, trustees, and tenants.

Inquiry as to incumbrances, should be made of vendor's solicitors ;

and of supposed incumbrancers.

(a) As to the expediency of this before the Registration Commission-
inquiry, see Mr. Christie's evidence
ers, 1st Report.

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parties applied to will be bound by their replies (b); it does not, however, appear that a mortgagee need answer any inquiry respecting the particulars of his security, unless the applicant is entitled and offers to redeem him (c). It is better to restrict the general requisition to an inquiry whether the vendor is aware of any document, judgment, or charge affecting the title or the property, not noticed in the abstract, and which, *if remaining undisclosed*, may prejudicially affect the purchaser; but the vendor's solicitors, and, as a general but not universal rule, the vendor himself, are bound to answer the inquiry even if unrestricted (d).

Whether incumbrancer need communicate his claim to intended purchaser.

An incumbrancer, it is said, need not voluntarily communicate the existence of his claim to a person whom he knows to be about purchasing the estate (e): this, however, it is conceived, only holds good in cases where there is no reason to suppose that the vendor is about to commit the fraud of selling the estate as unincumbered: if, with knowledge of such a fraud being in progress, the incumbrancer were to conceal his claim, Equity appears, would interfere to prevent his setting up his claim against the purchaser; and infancy, or coverture, would be no excuse (f): *a fortiori*, would he be postponed in Equity, if a direct party to the fraud, or facilitating or encouraging its commission (g): and, inasmuch as no prudent person buys an equity of redemption without communicating with a known incumbrancer, it may be conjectured that if a mortgagee, being aware that the purchase was about to be concluded on a certain day, and having received no inquiry from the purchaser on the subject of the charge, were to allow him to complete in ignorance of its existence, the Courts would be

(b) *Ibbotson v. Rhodes*, 2 Vern. 554; *Stronge v. Hawkes*, 4 De G. M. & G. 184; 4 De G. & Jo. 632; *vide supra*, p. 96.

(c) See *Haydon v. Bignold*, 3 Y. & C. C. 390.

(d) *Salomon v. Dorey*, V.-C. Hall, March 1875; *vide supra*, p. 301.

(e) *Osborn v. Bos*, 9 Mod. 96; see

p. 97; *Dolman v. Nokes*, 23 Beav. 402.

(f) *Savage v. Foster*, 9 Mod. 36; *Clare v. Earl of Bedford*, 15 Vin. Abr. 536; and see *Re Lush's Trusts*, L. R. 4 Ch. Ap. 591. And as to fraud by a married woman, *vide infra*, Ch. XV. s. 2.

(g) *Barriefford v. Willmott*, 2 Atk. 49.

disposed, on slight additional grounds, to treat such an incumbrancer as an accomplice of the vendor (*h*).

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If the interest about to be purchased be merely equitable, inquiry as to incumbrances, should, as a matter of prudence, be made of the trustees, or other parties in whom the legal estate is vested; and, as a general rule, notice should be given to them of completion. Thus, notice to trustees for sale of an assignment of a share of the sale proceeds will give priority, even though the estate is unsold, and the time for selling has not arrived (*i*). The same precaution is not absolutely necessary where the subject-matter of the purchase is an equitable interest in real estate, or in a chattel real (*k*); but a solicitor who acts with a view to his own, as well as to his client's safety, will in this, as in every other doubtful case, use too much, rather than too little, caution. Trustees are often unwilling to answer such questions, on account of a case (*l*) where a trustee, who (through forgetfulness as he subsequently alleged) denied the existence of a charge of which he had notice, was held liable to the purchaser: it appears, however, that he told the purchaser "positively and distinctly" (*m*) that the vendor was absolutely entitled, that he had "an undoubted right" to assign the property (*n*); and, probably, a more guarded reply, one, for instance, merely denying the present recollection of any notice, would not involve a trustee in similar liability.

Inquiry of
trustees.

Liability of
trustee giving
wrong infor-
mation.

And, as notice of a tenancy is notice of the tenant's equities (*o*), it is a proper precaution, where the property is not in hand, to inquire of the occupying tenants as to the

Inquiry of
tenants.

(A) And see *Sibson v. Fletcher*, 1 Ch. R. 32.

(i) *Lee v. Howlett*, 2 K. & Jo. 531; *Re Hayles' Trusts*, 3 H. & M. 89; *Foster v. Cockerell*, 3 Cl. & F. 456. And see as to notice *infra*, Ch. XV. s. 2.

(k) See cases cited in last note, and *Jones v. Jones*, 8 Sim. 633; *Wiltshire v. Rabbitts*, 14 Sim. 76; *Wilmet v. Pike*, 5 Ha. 14; *Rooper v. Harrison*, 2 K. & Jo. 103.

(l) *Barrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 De G. F. & J. 518; *Barry v. Croucher*, 2 J. & H. 1.

(m) 10 Ves. p. 476.

(n) *Id.* p. 475.

(o) See Lord Eldon in *Allen v. Anthony*, 1 Mer. 282—284; *Daniels v. Davison*, 16 Ves. 249; *Bailey v. Richardson*, 9 Ha. 734; *Wilbraham v. Linssey*, 18 Beav. 209; *Oswander v. Butler*, L. R. 9 Ch. Ap. 79, 84.

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*Reference to
occupancy.*

extent and nature of their interests (*p*). It was stated in former editions of this work, that notice of the tenancy was not necessarily notice of the tenant's equities, as between vendor and purchaser. The point, however, was recently decided the other way by Lord Romilly (*q*), and his decision was subsequently followed in a case in the Common Pleas (*r*); but in a still later case (*s*) the Lords Justices, affirming the decision of Sir Geo Jessel, M.R., restored what is conceived to be the true rule, *viz*, that the doctrine as to notice has reference merely to equities between the purchaser and the tenant after the completion of the contract, and has nothing to do with the rights and liabilities of vendor and purchaser pending completion. The obvious answer to the reasoning in Lord Romilly's judgment in the case before him above referred to is that it is not the duty of the tenant, and it is the duty of the vendor to inform the purchaser what it is that he is about to buy. A description of property as "now or late in the occupation of N R and others," has been held not to affect the purchaser with notice that the tenants held on leases for lives at low rents (*t*). So, in another case, where a shop with a flat roof was demised "as the same was late in the occupation of H. C.," it was held that these words were inserted in the description, merely for the purpose of identifying the property, and not of limiting the operation to the deed; and that they did not amount to a notice of a right to the occupation of the flat roof (*u*); but a purchaser buying the undivided share of a tenant in common in a house, which the purchaser knows is occupied for business purposes by a firm in which the vendor is a partner, has notice that

(*p*) 1 Jarm. Conv. by S. 119.

(*q*) *James v. Lichfield*, L. R. 9 Eq. 81; see also *Penny v. Watts*, 2 De G. & Sm. 501; 1 Mac. & G. 150; *Wilbraham v. Livery*, 18 Beav. 206, & 1 Hare, 62.

(*r*) *Phillips v. Miller*, L. R. 9 C. P. 198.

(*s*) *Onballero v. Henty*, L. R. 9 Ch.

Ap. 447.

(*t*) *Hughes v. Jones*, 3 De G. F. & Jo. 307.

(*u*) *Mortyr v. Lawrence*, 2 De G. Jo. & S. 261; dissentiente K. Bruce, L. J.; and see *Folden v. Bastard*, L. R. 1 Q. B. 156, a case of devise. And see further on this subject, Ch. XV. s. 5, *infra*.

the house is partnership property, should such be the fact (*x*).

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No inquiries need be made of a person who has recently held, but relinquished possession of the property (*y*); if it is clear that there has been an intentional abandonment of possession (*z*).

Where a tenant has recently given up possession.

It may often be prudent for a purchaser to inquire whether any undisclosed easement, such as a way of necessity or a right of drainage (*a*), exists over or through the property; such an easement may pass or be reserved by implication, without express words (*b*); and the existence of such an easement where it is patent, and no inquiry has been made respecting it, is no defence to a vendor's suit for specific performance (*c*).

Inquiry as to undisclosed easements.

So, too, it may sometimes be well to inquire whether there are any undisclosed covenants or conditions, restrictive of the enjoyment of the property in the hands of the purchaser (*d*).

As to undisclosed restrictive covenants.

So, a prudent purchaser will inquire for the title deeds, and demand a satisfactory explanation, if any of them are not forthcoming. His omission to make such an inquiry may perhaps fix him with notice of an equitable mortgage by deposit (*e*). So a mere physical fact may, it seems,

As to title deeds.

Physical fact may be notice

(*x*) *Curander v. Balleel*, L. R. 9 Ch. Ap. 79; when the transaction was a mortgage.

(*y*) *Miles v. Langley*, 1 Russ. & M. 39.

(*z*) *Holmes v. Powell*, 8 De G. M. & G. 572, 581.

(*a*) And see *Hervey v. Smith*, 22 Beav. 299, S. C. on motion, 1 K. & Jo. 389; case of undisclosed smoke easement, and *infra*, Ch. XV. s. 5.

(*b*) *Pearson v. Spencer*, 7 Jur. N. S. 1195; *Pyer v. Carter*, 1 H. & N. 916; *Ewart v. Cochrane*, 7 Jur.

N. S. 925; *Watts v. Kelson*, L. R. 6 Ch. Ap. 166; case of underground artificial watercourse.

(*c*) See *Oldfield or Bowles v. Round*, 5 Ves. 508.

(*d*) See *Parker v. Whyte*, 1 H. & M. 167; *Robson v. Night*, 13 W. R. 195; *Clements v. Welles*, L. R. 1 Eq. 200; *Morland v. Cook*, L. R. 6 Eq. 252; *Wilson v. Hart*, L. R. 1 Ch. Ap. 463; and see and consider *Carter v. Williams*, L. R. 9 Eq. 678.

(*e*) Sugd. 767, and cases there cited.

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 of a charge,
 &c.

amount to notice of a charge affecting the property; *e.g.*, upon the purchase of land forming part of a district lying beneath the level of the neighbouring sea, the purchaser was held to be affected with notice of a private deed, under which the owners of the land were liable to contribute to the expense of keeping up a sea-wall (*f*): so, the purchaser of a house has been held to have notice of an agreement to grant a smoke-easement, from the mere fact of there being fourteen chimney-pots on the chimney stack, and only twelve flues in the house (*g*).

Section 2.

What searches
 should be
 made for in-
 cumbrances;—
 law respecting
 judgments,
 &c.

Liability of
 solicitor omit-
 ting to search
 for incum-
 brances, &c.

(2) *What searches should be made for incumbrances;—Law respecting judgments, &c.*

A solicitor is said to be liable to his client for any loss occasioned by his omission to make any one of the numerous searches, which may by possibility disclose matter affecting the title (*h*); unless, however, special circumstances render such a course expedient, it has not been usual for conveying counsel, upon private purchases, to direct a search for more than judgments (*i*), crown debts and accountantships, *lis pendens*, and annuities (although the search for these is now practically useless (*k*)); and also a general search in the county register (if any), and in the Customary Court Rolls, (if the property is copyhold;) and it may be doubted whether a solicitor would be liable for an omission which is sanctioned by general practice. At any rate, it is conceived, that where the title is laid before counsel, who advises a

(*f*) *Morland v. Cook*, *ubi supra*.

(*g*) *Hervey v. Smith*, 22 Beav. 299.

(*h*) 1 Jarm. Conv. p. 104; *Watts v. Porter*, 3 El. & B. 748; see, as to negligence in stating a case for counsel's opinion, *Green v. Pearman*, 5 Dowl. & B. 687; as to negligence in passing a defect in title *Baile v. Chandless*, 3 Camp. 17; and generally as to the liability of a solicitor omitting to make the usual searches, see *Brooks v. King*, 2 Dick. 678; *Parker v. Bates*,

14 C. B. 691.

(*i*) And now for writs of execution under the 23 & 24 Vict. c. 38. Judgments entered up against an insolvent under the 1 & 2 Vict. c. 110, were frequently omitted to be registered; it being considered doubtful whether they required registration under the Act.

(*k*) Under the 18 & 19 Vict. c. 15. s. 12. *Vide infra*.

search for certain specified incumbrances, the solicitor need not make a more extensive search, unless aware of some particular reason for so doing: but if to his knowledge such reason exist, he is bound to act upon it: *e.g.*, it has been said that he was bound to search the Insolvent Court, if he had reason to suspect that the vendor had been insolvent, or even if there was notice that he was or had been in embarrassed circumstances (*l*): and the fact of the solicitor making inquiry on the point from a party whose known interest it was to deceive him, has been held to be an admission as against himself that an efficient search ought to have been made (*n*).

And on purchases of large estates, or even of agricultural land of moderate acreage, it is now prudent to search for drainage and land improvement loans (*n*). These incumbrances, where they exist, take priority of all other charges; and, in more than one instance in the author's own experience, an omission to make the search would have involved serious consequences. The expediency of making it is not, however, as generally known in the profession as it ought to be.

Drainage
loans.

The full list of searches is a formidable, almost a prohibitive, one; comprising writs of execution, registered under 23 & 24 Vict. and 27 & 28 Vict. c. 112, judgments, crown debts (*o*), decrees, orders, and *lis pendens*, registered under the 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, and grants of annuity and rentcharges registered under the 18 & 19 Vict. c. 15 (*p*); searches for recognizances, and for grants of life

(*l*) By Erie, J., in *Cooper v. Stephenson*, 16 Jur. 424; 21 L. J. Q. B. 292; a case of a mortgage.

(*m*) S. C.

(*n*) See 19 & 20 Vict. c. 9; 24 & 25 Vict. c. 133, and 27 & 28 Vict. c. 114; see also 33 & 34 Vict. C. 56. Searches at the Office of the Inclosure Commissioners, No. 3, St. James's Square, and at the Land Registry

Office, are generally sufficient. See further on the subject, Dav. Conv. 3rd ed. vol. 2, pp. 743, *et seq.*; and see also the Mortgage Debenture Act 1865, 28 & 29 Vict. c. 73.

(*o*) See now 28 & 29 Vict. c. 104, s. 48; lands are not now bound by crown debts, until execution has issued, and been registered.

(*p*) The place of search is the

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annuity and rentcharges registered under the former Acts (*q*), for adjudications in bankruptcy, and for deeds of composition or inspectorship under the Bankruptcy Act, 1801 (*r*), and also the county registers (*s*), and manorial Court Rolls in the appropriate cases, and also in many cases for drainage and land improvement loans.

As to searching for judgments—general law respecting.

Of these searches, the most generally important is that for judgments, and writs of execution issued under them; and, although the necessity for making this search, or rather the risk of omitting to do so, has been greatly lessened by recent legislation, it is still necessary, in order clearly to understand the law on this important subject, to consider it briefly as it existed prior to the 1 & 2 Vict. 110, and then the alterations which have been introduced by that and later statutes.

As respects purchasers, &c., without notice, law remains as before 1 & 2 Vict. c. 110.

And here it may be proper to observe, that as against purchasers or mortgagees who advance their money without notice of subsisting judgments, the 1 & 2 Vict. c. 110, is rendered a dead letter by the subsequent Act of 2 & 3 Vict. c. 11 (*t*): so that, as respects such purchasers and mortgagees, the Law as it existed before the passing of the former Act, is, with the above exception, alone important: nor does registration under that Act amount to notice (*u*); unless a search is actually made (*x*): at the same time it is inexpedient to rely upon any presumed want of notice (*y*), (especially where the same solicitor acts for both parties;)

But want of notice cannot

office of the Court of Common Pleas, Rolls Gardens, Serjeant's Inn, Chancery Lane.

(*q*) Place of search: the Inrolment Office, Chancery Lane.

(*r*) Place of search: Court of Bankruptcy, Basinghall Street.

(*s*) Place of search for Middlesex: Bell Yard, Fleet Street.

(*t*) Extended to judgments in the Palatine Courts, by 18 & 19 Vict. c. 15.

(*u*) See and consider 2 & 3 Vict. c. 11, s. 8; so held in *Robinson v.*

Woodward, 4 De G. & S. 562; *Westbrook v. Ditch*, 3 El. & B. 737; *Lane v. Jackson*, 20 Beav. 535; where it was held that it was not incumbent on the purchaser to search the register.

(*x*) *Procter v. Cooper*, 2 Dra. 1; affd. 1 Jur. N. S. 149.

(*y*) For this, among other reasons, viz: that if judgments exist, and are discovered by a subpurchaser upon a resale, it may be impossible to satisfy him of the original want of notice. *Freer v. Hesse*, 4 De G. M. & G. 495.

and the propriety of a search by an intended purchaser or mortgagee, may, practically, be considered chiefly with reference to the extended effect of judgments under the new law.

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—be relied on
in practice.

Upon an *elegit*, under the old law, the judgment creditor might take in execution a moiety, (or under two judgments of the same term an entirety (2),) of the following property of his debtor (a): *viz.*, freeholds, land held in ancient demesne, rents-charge, estates granted by the Crown for the maintenance of dignities, impropriate tithes, and terms for years, including (perhaps), leases of copyholds granted by licence of the lord, or under a special custom; and this, whether the same respectively were held in severalty, coparcenary, or in common; and although they were acquired subsequently to the judgment (b).

Judgments
under old law
—what they
affected :

a moiety of
freeholds, &c.;

The right affected reversions, estates held by a husband during coverture or by the curtesy, estates tail during the life of tenant in tail, and estates held in joint-tenancy during the life of the joint-tenant.

reversions ;

And, as to terms for years, either the moiety might be extended upon a single writ, or the entirety might be sold as part of the debtor's chattels.

terms for
years ;

And under the 10th section of the Statute of Frauds, the sheriff is empowered to deliver execution of all such lands, &c., as any person or persons should be seised or possessed of, in trust for the debtor, like as if the debtor had been seised of such lands, &c., of such estate as they be seised for him at the time of execution sued. This provision has been held not to affect trusts of terms for years (c), or equities of

lands held in
trust for the
debtor.

(2) *Att.-Gen. v. Andrew*, Hard. 23 ;
Doe v. Creed, 5 Bing. 327 ; (case of
entirety taken by two creditors on
writs tested the same day and term).

(a) *Prid. on J.* 7, 8, 9.

(b) *Brace v. Duchess of Marlborough*,
2 P. Wms. 491, 492.

(c) *Prid. J.* 15 ; *Scott v. Scholey*,
8 East, 467 ; nor could such a trust
be taken on a *f. fa.*, *ib.* ; and see the

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redemption (d), or any equitable estate in which the debtor has not the sole beneficial interest (e); or estates which, although held in trust for the debtor at the date of the judgment, are aliened prior to execution (f).

What they did
not affect.

But advowsons in gross, glebe, rents-seck, and copyholds (g) (except, perhaps, as respects leases thereof), were not extendible under the old law; nor were the lands of a tenant in tail, or joint-tenant, so extendible, except for his life (h).

And it seems doubtful whether the exemption of copyholds extended to customary freeholds (i).

Nor, as against purchasers (k), was a term for years bound, until the writ was delivered to the sheriff (l): nor did the writ bind after it had been returned without a sale (m).

Docketing was
necessary as
against pur-
chasers.

And in order that a judgment might be binding as against purchasers, or mortgagees, it had, unless it were a Palatinate judgment, to be docketed under the Acts of William and Mary (n); a very slight omission in the prescribed formalities as to docketing rendered the judgment void (o); but an old undocketed judgment, if duly registered under the 1 & 2 Vict. c. 110, became valid under 2 & 3 Vict. c. 11, s. 5, against

Recent case of *Padwick v. Duke of Newcastle*, 18 W. R. 8; but see, as to attendant terms, *Doe v. Evans*, 1 Cro. & M. 450; and see *Doe v. Greenhill*, 4 B. & Ald. 684.

(d) *Burdon v. Kennedy*, 3 Atk. 739; *Lyster v. Dolland*, 1 Ves. J. 431.

(e) See *Doe v. Greenhill*, 4 B. & Ald. 684; *Harris v. Booker*, 4 Bing. 98; *Forth v. Duke of Norfolk*, 4 Madd. 405; *Haines v. Day*, 10 Sim. 48.

(f) *Hunt v. Cole*, Com. R. 226; *Harris v. Pugh*, 4 Bing. 333, 345, *Higgins v. York Buildings Co.*, 2 Atk. 107; and see 1 S. & L. 634.

(g) See *Scriv. on Copyholds*, 5th ed. p. 28.

(h) *Prid. on J. 8.*

(i) See *Scriv. on Copyholds*, 5th ed. p. 415; *Mann. Exch. Pract. Revenue Branch* 2nd ed. 42, 350, 358, 359, 360; 3 *Man. & R.* 332, 338.

(k) *See aliter*, as against the debtor's personal representatives; *Ranken v. Harwood*, 5 Ha. 215.

(l) *Prid. on J. 13*; *Burdon v. Kennedy*, 3 Atk. 739; *Couston v. Macken*, 2 Sim. 242.

(m) *Williams v. Cradlock*, 4 Sim. 312.

(n) 4 & 5 Wm. & M. c. 20; made perpetual by 7 & 8 Wm. III. c. 24.

(o) *Brendling v. Plummer*, 8 De G. M. & G. 747; 26 L. J. N. S. 326.

purchasers and mortgagees without notice, to the extent which a judgment, duly docketed under the old law, would have had against them (p). By the 4 & 5 William and Mary, c. 20, no undocketed judgment was to have any preference against heirs, executors, or administrators in the administration of assets. The 1 & 2 Vict. c. 110, did not contain any similar provision; and the result of closing the docket under the 2 & 3 Vict. c. 11, was to revive the law as it existed prior to the Statute of William and Mary; thus making an executor liable for a *devastavit*, if he paid a simple contract debt before a judgment debt, even though he had no actual notice of the latter (q); but this omission has been supplied by a recent Statute (r).

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As against ex-
ecutors and
administrators
in administra-
tion of assets.

Where the judgment was intended to affect land in a Register County, it had to be entered in the local register; and the priorities of several judgments *inter se* depended upon the order of their registration (s); so that a judgment registered in the Common Pleas, but not in the Local Register, was postponed to a subsequent judgment which was first entered in the local register (t).

Entry in local
register.

The omission to docket or register, was, however, immaterial in Equity, if a purchaser or mortgagee advanced his money with actual notice, (either to himself or his agent,) of the judgment (u). In a case already referred to, where an estate was conveyed "subject to the charges and incumbrances affecting the same," a judgment against the vendor, in docketing which the "number roll" had not been entered, was held not to affect the land: but the decision rested entirely on the question whether the requisitions of the

But purchaser
was bound in
Equity by
notice of un-
docketed
judgment.

(p) *Dowell v. Reece*, 11 Jur. N. S. & H. 686; 3 De G. F. & J. 318; 764. *Nave v. Flood*, 10 Jur. N. S. 607;

(q) *Fuller v. Redman*, 26 Beav. 600. 33 Beav. 536.

(r) 28 & 24 Vict. c. 38, ss. 3 & 4. (t) See *Hughes v. Lumley*, 4 E. & B.

(s) *Prid. on J.* 47, 49; see *Johnson v. Holdsworth*, 1 Sim. N. R. 106; 274; *Nave v. Flood*, 33 Beav. 666. (u) *Prid. on J.* 51; *Davis v. Earl of Strathmore*, 16 Ves. 419; see *Cockburn v. Wright*, 6 Ir. Eq. R. 1; *Sug. El. & B.* 274; *Benham v. Keefe*, 1 Jo. 521.

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Statute had been complied with; and it does not appear that the purchaser had examined the docket-book (x).

Equity aided
judgment
creditor
against equi-
table estates.

And Equity would assist a judgment creditor to the partial equitable interest of his debtor, in those cases in which he would have been entitled to execution under the Statute of Frauds in case the debtor had owned the entire beneficial interest (y); but he was obliged to sue out an *elegit* before filing his bill (z). So, first suing out execution under a *fi. fa.*, he could obtain relief in Equity against the debtor's equitable interest in a term for years (a).

Judgment how
affected by
bankruptcy.

The judgment creditor acquired no preference in bankruptcy, unless execution had been sued before the issuing of the fiat or commission (b); but the bankruptcy of the vendor after conveyance, was no protection to a purchaser against prior judgments (c). If, however, the vendor became bankrupt before conveyance, the judgments were held to be inoperative as against a purchaser from the assignees (d).

Under the
recent Act.

Under the Bankruptcy Act, 1869 (e), any execution or attachment against the land of the bankrupt, executed in good faith before the date of the order of adjudication, if the person, on whose account such execution or attachment was issued, had not, at the time of the same being so executed by

(x) *Brandling v. Plummer*, 8 De G. M. & G. 747.

(y) *Prid. on J.* 25.

(z) *Neale v. Duke of Marlborough*, 3 Myl. & C. 407; *Smith v. Hurst*, 1 Coll. 705; *S. C.*, 10 Ha. 30; *Godfrey v. Tucker*, 33 Beav. 280.

(a) See *Gore v. Bowser*, 1 Jur. N. S. 392; *Langhorne v. Harland*, 2 Jur. N. S. 373.

(b) *Oriebar v. Fletcher*, 1 P. Wms. 737; *Newland v. Anon*, 1 P. Wms. 72; *Sloper v. Fish*, 2 Ves. & B. 145; *Re Parry*, 2 Dru. & W. 172; *Sharpe v. Roake*, 2 Ro. 192; 6 Geo. IV. c. 16, s. 106; but see 12 & 13

Vict. c. 106, s. 184; which section was not repealed by 24 & 25 Vict. c. 134; see Schedule G. *Hutton v. Cooper*, 2 Pr. R. 104; 6 Exch. 159; *Ex parte Boyle*, 3 De G. M. & G. 515; and see Coote on Mortgages, 3rd ed. 68. See, too, *Holmes v. Tutton*, 24 L. J. N. S. 346; Sug. 539; and see now 32 & 33 Vict. c. 71, s. 95.

(c) *Baldwin v. Becher*, 1 J. & L. 18, 25; *aliter*, as regards a mortgagee; *Willock v. Dargan*, Ir. Ch. R. 89; *White v. Baylor*, 4 Dru. & W. 297.

(d) *Sharpe v. Roake*, 2 Ro. 192.

(e) 32 & 33 Vict. c. 71, s. 95.

seizure, notice of any act of bankruptcy committed by the bankrupt, and available against him, is to be valid, notwithstanding any prior act of bankruptcy; and there is a similar provision as respects any execution or attachment against the goods of the bankrupt.

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It followed from what has been above stated, that a purchaser who, before execution sued (*f*), got in an outstanding legal estate, (even a mere satisfied term,) or procured a declaration of trust in his favour by the trustee, or who, (as in the case of a mortgagee purchasing the equity of redemption,) was himself seised or possessed of the legal estate, was protected from judgments of which he had no notice (*g*) at the time of his purchase: but, of course, where the outstanding estate was less than the fee simple, it was no protection against subsisting judgments of a date prior to its creation; and the want of notice was essential in Equity.

Purchaser without notice protected by legal estate.

But the exercise of a power of appointment defeated a judgment entered up subsequently to the creation of the power; and notice in this case was immaterial (*h*), for the judgment only affected the estate limited until and in default of appointment.

Purchaser under power of appointment, not affected by judgments, notwithstanding notice.

A judgment entered up against the vendor, subsequently to the contract but before conveyance, was immaterial in Equity (*i*), except that it formed a lien upon such part (if any) of the purchase-money as remained unpaid (*k*); and an ejectment against a purchaser in possession by a creditor who had sued out an *elegit* on such a judgment, would be restrained by injunction (*l*): so, also, a trust for sale was not affected by subsequent judgments against any party upon

Effect of judgment after contract.

(*f*) Sng. 539.

(*g*) *Tunstall v. Trappes*, 3 Sim. 286, 299; *Greswold v. Marsham*, 2 Ch. C. 170.

(*h*) 3 Sim. 300; *Eaton v. Sanxier*, 6 Sim. 517; *Skeels v. Shearly*, 3 Myl. & C. 12; where an indemnity was taken against the judgment.

(*i*) See *Loche v. Lyseley*, 4 Sim. 70, 75; Sng. 519.

(*k*) Frid. on J. 21; *Forth v. Duke of Norfolk*, 4 Madd. 505; see as to Bankruptcy, cases cited *supra*, n. (*b*).

(*l*) *Brunton v. Neale*, 14 L. J. N. S. Ch. 8.

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whom such trust was binding; nor, if the trustee had power to give receipts, were the judgment creditors necessary parties to the conveyance (m): nor was it material that the sale was not by the trustees, but by the Court (n): and the same, it is conceived, is the rule under the new law. Even a voluntary settlement in favour of third parties is unaffected by a subsequent judgment against the settlor (o): but a bare voluntary trust for sale, when merely equivalent to an authority to sell, for the settlor's own benefit, would, it is apprehended, be subject to judgments entered up against him, prior to a binding contract being entered into by the trustee.

Extended
legal opera-
tion of judg-
ments under
1 & 2 Vict.
c. 110.

By the 11th section of the 1 & 2 Vict. c. 110, (as modified by the 2 and 3 Vict. c. 11, and 3 & 4 Vict. c. 82,) a judgment, duly registered, entitles the creditor to take in execution,—except as against purchasers, mortgagees, or creditors (p) who became such before the first day of October, 1838, and also purchasers and mortgagees without notice (q),—an entirety of “all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised, or possessed of, at the time of entering up (r) the said judgment, or at any time afterwards; or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing

(m) *Lodge v. Lyseley*, 4 Sim. 70; and see *Foster v. Blackstone*, 1 Myl. & K. 307; *Broune v. Carendish*, 1 J. & L. 606, 628, et seq.; *Robinson v. Helger*, 18 Jur. 846, V.-C. E.

(n) *Alexander v. Crosby*, 1 J. & L. 672.

(o) *Beavan v. Lord Oxford*, 2 Jur. N. S. 121; 6 De G. M. & G. 507.

(p) Which seems to include simple contract creditors; *In re Perrin*, 2 Dr. & W. 147; decided contra on the English Act, *Simpson v. Morley*, 2 K. & J. 71; the judgment, and dis-

tinguish *In re Perrin*.

(q) 2 & 3 Vict. c. 11, s. 5.

(r) That is, the day on which judgment is originally signed in the Master's book, not the day on which the roll is carried in and the judgment is entered of record; and this, although the original entry in the Master's book be subsequently amended on a revision of the taxation of costs: *Picker v. Dudding*, 3 Man. & G. 225; *Norton v. Grand Junction R. Co.*, 16 M. & W. 143; but see *Pierce v. Derry*, 4 Q. B. 685.

power, which he might, without the assent of any other person, exercise for his own benefit."

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And by the 13th section of the 1 & 2 Vict. c. 110, (as modified by the same Acts,) a registered judgment is, (except as against purchasers or mortgagees without notice, or purchasers, mortgagees, or creditors, who became such before 1st October, 1838,) made to operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (s) (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at Law or in Equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit (t); and is to be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment; and is also to be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments: and every judgment creditor is to have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of the Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in Equity to obtain the benefit

Extended equitable operation of judgments under 1 & 2 Vict. c. 110.

(s) As to leaseholds being included in this section, see *Arison v. Holmes*, 1 J. & H. 530, 544.

(t) Which excludes a power of testamentary appointment, *see* *ibid.*

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of such charge until after the expiration of one year from the time of entering up such judgment (u). This proviso does not render it necessary that a year shall have elapsed since registration (x).

Judgments
under the 23 &
24 Vict. c. 38.

By the 23 & 24 Vict. c. 38, after reciting that it was desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates, in respect of judgments, statutes, and recognizances, as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary, or leasehold, to ascertain when execution has issued on any judgment, statute, or recognizance, and to protect them from delay in the execution of the writ, it was enacted, that no judgment, statute, or recognizance, to be entered up, after the passing of the Act, should affect any land of whatever tenure, as to a *bond fide* purchaser for valuable consideration, or a mortgagee, (whether such purchaser or mortgagee had notice or not of any such judgment, statute, or recognizance,) unless a writ, or other due process of execution of such judgment, &c., should have been registered as therein mentioned, before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him; but it was provided that no judgment or writ of execution, although duly registered, should affect any land as to a *bond fide* purchaser or mortgagee, unless such execution should be put in force within three calendar months from the time when it was registered. The Act also established a register for writs of execution, and prescribed a new mode of registration, viz., in the name of the execution creditor; thus rendering a double search necessary (y). The Act also restored to heirs, executors, and administrators, in the administration of their ancestors', testators', and intestates' effects, that protection against unregistered judgments which was inadvertently taken from

(u) See *Smith v. Hurst*, 1 Coll. 705.

(x) *Dorchester &c. R. Co. v. Bainbridge*, 15 Beav. 146.

(y) Sect. 2. But see now 27 & 28 Vict. c. 112, s. 3.

them by the closing of the docket under the 2 & 3 Vict. c. 11 (z); and provided for the re-registration, as against them, of judgments every five years (a).

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By the 27 & 28 Vict. c. 112, after reciting that it was desirable to assimilate the law affecting freehold, copyhold, and leasehold estates, to that affecting purely personal estates, in respect of *future* judgments, statutes, and recognizances, it was enacted, that no judgment, statute, or recognizance, to be entered up after the passing of the Act, should affect any land of whatever tenure, until such land should have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance; and the 3rd section provides for registration in the manner prescribed by the 23 & 24 Vict. c. 38, (save only that it is to be in the debtor's and not the creditor's name;) and dispenses with prior or other registration of the judgment, statute, or recognizance; and under the 4th section the judgment creditor, having complied with the requisitions of the Statute, can apply to the Court of Chancery for a summary order for sale (b).

Judgments
under the 27 &
28 Vict. c. 112.

It is beyond the scope of this treatise to attempt an exhaustive inquiry into the law upon this intricate subject; and, in the following remarks, it is proposed briefly to consider, 1st, what are judgments within the meaning of the recent Acts; 2ndly, what property of the debtor they affect; 3rdly, what are the present remedies of the judgment creditor; and 4thly, how far the recent statutory provisions affect the law of vendor and purchaser.

And, first, what are judgments within the recent Acts:—

By the 18th section of 1 & 2 Vict. c. 110, decrees and

Certain de-
crees and

(z) Sect. 3; and see *Fuller v. Red-* and 18 & 19 Vict. c. 15.
man, 26 Beav. 800, and *supra*, p. 459. (b) *Vide infra*.
(a) Sect. 4; and see 2 & 3 Vict. c. 11,

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orders have
the effect of
judgments.

Judgments of
inferior Courts
may be re-
moved. g

Decrees and
orders of Pala-
tine Court.

The decree or
order must be
for the pay-
ment of
money.

orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor, or of the Court of Review (while it existed) in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, are to have the effect of judgments. And by the 22nd section, judgments, &c., of certain inferior Courts of record may be removed into the superior Courts; and are there to be registered; and thereupon are to become binding as judgments of such superior Courts (c); and by the 13 & 14 Vict. c. 43, s. 24, the provisions of the 1 & 2 Vict. c. 110, as to decrees and orders in Equity, are made applicable to decrees and orders of the Palatine Court of Lancaster; but before the latter can affect any land as against purchasers, mortgagees, or creditors, full particulars of the cause or matter, and of the decree or order made therein, are to be left with the prothonotary of the Court of Common Pleas at Lancaster, and entered by him in a book kept for the purpose.

But, in order to bring a decree or order of a Court of Equity within the 1 & 2 Vict. c. 110, it must be one "whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person." Thus, a decree for an account, and for payment of what shall be found due thereon, does not entitle the person in whose favour it is made to obtain a charging order, pending the taking of the account (d); so, where a decree was obtained against an executor for payment of a certain sum to his testator's estate, with which he was to be charged in taking the accounts in a pending administration suit, it was held that it did not constitute a judgment debt (e); so, a decree directing payment to the credit of a cause, is not within the Act (f); so, a decree directing payment of costs is not a charge upon

(c) See 18 & 19 Vict. c. 15, s. 7.

230.

(d) *Chadwick v. Holt*, 2 Jur. N. S. 918; distinguish *Duke of Beaufort v. Phillips*, 1 Dr. G. & S. 321.

(f) *Ward v. Shakeshaft*, 1 Dr. & S. 269, 272. But see *Gibbs v. Pike*, 6 Jur. 465.

(e) *Garner v. Briggs*, 4 Jur. N. S.

land, until the costs have been taxed, and the decree registered (*g*); and a certificate of the chief clerk, finding money due, is not an "order for payment" (*h*): so, the person who seeks to enforce as a charge on land a rule of a Court of Common Law directing payment of money, must be the person to whom the money is payable under the rule (*i*).

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It has been held, on the construction of the 25th section of the 20 & 21 Vict. c. 77, that an order of the Court of Probate does not, merely by being registered, constitute a valid charge on land, which can be enforced in Equity (*k*); but in a later case, on the analogous section in the Divorce Act, (20 & 21 Vict. c. 85, s. 52,) where a decree in a divorce suit was registered under the 1 & 2 Vict. c. 110, the Court of Common Pleas refused the husband's application to have the entry expunged, leaving him to his remedy (if any) in Equity (*l*). A judgment of a County Court, constituted under the 9 & 10 Vict. c. 95, does not fall within the 22nd section of the 1 & 2 Vict. c. 110 (*m*). Under the Bankruptcy Act, 1861, (24 & 25 Vict. c. 134,) costs might be awarded which were made recoverable in the same manner as costs awarded, by rule of any of the superior Courts at Westminster; and under the Act of 1869 there is a similar rule as to costs awarded by the London Bankruptcy Court (*n*). The provisions as to registration contained in the 23 & 24 Vict. c. 38, were by the Act of 1861 made applicable to an order of the Court of Bankruptcy directing payment of costs (*o*). By the 24 & 25 Vict. c. 10, s. 15, decrees and orders of the Court of Admiralty, for payment of money, are to have the effect of judgments; and the persons, to whom the

Orders of Probate Court;
of Divorce Court;

of County Courts;

of Bankruptcy Courts;

of Court of Admiralty.

(*g*) *Northcliffe v. Warburton*, 10 W. R. 335.

(*h*) *Lord Mansfield v. Oyle*, 5 Jur. N. S. 419. And see *Shaw v. Neale*, 20 Beav. 157; 6 H. L. Ca. 581.

(*i*) *Crowther v. Crowther*, 2 Jur. N. S. 274.

(*k*) *Pratt v. Bull*, 4 Giff. 117; 32 L. J. Ch. 21; *affd. ib.* 144.

(*l*) *Ex parte Holden*, 9 Jur. N. S.

948; 13 C. B. N. S. 641.

(*m*) *Moreton v. Hull*, 1 Jur. N. S. 215; 10 Exch. 707. See as to County Court Orders, *Bennett v. Powell*, 3 Drew. 326.

(*n*) See General Rules under the 32 & 33 Vict. c. 71, s. 186; see also s. 187.

(*o*) 24 & 25 Vict. c. 134, s. 213.

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money is directed to be paid, are to have the Common Law rights of judgment creditors.

Meaning of
the term judg-
ment under
Acts of 1860
and 1864.

By the 5th section of the 23 & 24 Vict. c. 38, and by the 2nd section of the 27 & 28 Vict. c. 112, the term "judgment," in each of those Statutes, is to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment. The term is not *expressly* limited to such decrees or orders as direct the payment of money, or costs, charges, and expenses; but there can be but little doubt that such restrictive construction is the correct one.

Secondly, as to what property of the debtor is affected by judgments under the new law:—

What property
extendible
under the new
law.

Under the provisions of the 1 & 2 Vict. c. 110, and the succeeding Statutes, a creditor may now, (except as against purchasers and mortgagees prior to the 1st October, 1838, and purchasers and mortgagees without notice,) take under an *elegit* the entirety (instead of a mere moiety) of the debtor's property: and this right extends to copyholds, estates over which the debtor has only a general power of appointment, and leasehold estates; upon all of which the judgment can operate: and it is said, that where the interest in a term of years is merely equitable, it is subject to the legal as well as the equitable remedy (*p*). Where the property is of such a nature that it cannot be taken in execution, as, *e.g.*, an advowson, an estate in remainder, a reversionary interest, or an equity of redemption, the judgment, or the writ of execution, prior to the 27 & 28 Vict. c. 112, operated as an immediate charge upon the estate, instead of being, as formerly, a mere general lien (*q*); but under that Statute, actual delivery in execution is now necessary to create a charge (*r*).

Judgment an
immediate
charge in
Equity.

(*p*) See Sug. 524; 1 Dru. & W. 182; *Gore v. Bower*, 1 Sm. & G. 1, but see Coote on Mortgages, 3rd ed. 45; and see *Wallis v. Morris*, 10 Jur. N. S. 741.

(*q*) See 1 & 2 Vict. c. 110, s. 13; *Gore v. Bower*, and *Wallis v. Morris*, *ubi supra*.

(*r*) As to what is a delivery in execution of an equitable interest, see

It is also observable, that the estate of a joint-tenant is extendible as against the *jus accrescendi* of a surviving joint-tenant, and not, as formerly, merely for the life of the debtor.

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Estate of
joint tenant ;

It also seems probable that the judgment creditor of a tenant in tail, (where there is a protector,) can take the land in execution as against the issue in tail ; and that the judgment creditor of a tenant in tail, (where there is no protector,) can take the land in execution, not only as against the issue in tail but also as against remaindermen ; and there can be no doubt as to the rights, in Equity, of a judgment creditor of a tenant in tail. Where a judgment creditor filed a bill to realise his charge against a tenant in tail in possession, the latter was ordered to execute a disentailing deed (s).

of tenant in
tail.

It also seems probable that the joint donee of a power of appointment, who is entitled to any estate or interest in default of appointment, cannot, by concurring in an exercise of the power, defeat the lien of his judgment creditor upon such estate or interest ; as to do so would be to derogate from what is by the Statute made equivalent to his own personal assurance.

Joint power—
how affected.

In *Harris v. Davison*, Shadwell, V.-C., with reference to the 13th section of the 1 & 2 Vict. c. 110, said, that he "could not conceive any set of words better adapted to describe every possible interest in lands of every possible description ; they are as comprehensive as possible, and include lands of every tenure, except, perhaps, lands held in ancient demesne : " he then decided that a registered judgment operated as a charge upon the beneficial interest of the debtor (the grantee of a personal annuity) under a trust for sale of leaseholds for better securing the payment of the said annuity : so, an annuity charged upon, or issuing out of land

Judgment a
charge on
mortgage debt,
annuities, &c.,
payable out of
land.

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has been held to be an interest in land within the Statute (f); a like decision was come to in *Russell v. McCulloch* (i), as respects a gross sum of money secured by covenant, and by declaration of charge; and the same, it is conceived, must be the rule as to a legacy charged upon land. Where a trust fund was invested upon mortgage, a judgment creditor of one of the *cestuis que trust* was held entitled to a charge on the debtor's share of moneys payable out of the rents of the mortgaged property; but not on his share of the interest paid by the mortgagor under his covenant, and not taken from rents (x).

Practical in-
conveniences
resulting from
the doctrine.

The decision in *Russell v. McCulloch* seemed to establish, in theory, the necessity of searching for judgments against a mortgagee, upon paying off or taking a transfer or release of the security—and a like necessity in the case of any dealing with an annuity, or, it is conceived, a legacy, respectively charged on land; and it was very difficult to avoid the conclusion that the same precaution ought in strictness to have been taken in paying off, or assigning, or taking a release of a registered judgment debt; it being the statutory equivalent to an equitable mortgage; and that if judgments were found registered against a mortgagee, or against the owner of an annuity or legacy charged on land, the like searches should have been made in the names of his judgment creditors, and in like manner against their *puisne* judgment creditors (if any); and so on, in an infinite series. The practical inconveniences and absurdity of this excessive development of the doctrine laid down in *Harris v. Davison*, are self-evident, and were in fact the main argument adduced for disregarding that decision—a decision which, it may be remarked, seems fully warranted by the words of the 1 & 2 Vict. c. 110. There being thus evidently a *nodus vindice dignus*, the Legislature intervened, and by the 11th section of the 18 & 19 Vict. c. 15, enacted that “where any legal or equitable

Partially re-
medied by 18
& 19 Vict.
c. 15, s. 11.

(f) *Youngusband v. Gisborne*, 1 Wood, 4 Ha. 81.
De G. & S. 209.

(x) *Arison v. Holmes*, 1 J. & H. 530.

(u) 1 K. & J. 313; and see *Clare v.*

estate or interest or any disposing power in or over any lands, tenements, or hereditaments, shall, under any conveyance or other instrument executed after the passing of this Act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements, or hereditaments shall not be taken in execution under any writ of *elegit*, or other writ of execution, to be sued upon any judgment, or any decree, order, or rule against any mortgagee or mortgagees thereof, who shall have been paid off prior to, or at the time of the execution of, such conveyance [or other instrument as aforesaid—*Qy.*] nor shall any such judgment, decree, order, or rule, or the money thereby secured, be a charge upon such lands, tenements, or hereditaments [which, or any legal or equitable estate or interest in or disposing power over which shall become—*Qy.*], so vested in purchasers or mortgagees, nor shall such lands, tenements, or hereditaments [which, &c.—*Qy. ut ante*] so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable under any writ of extent, or writ of execution, or other process issued by or on behalf of her Majesty, her heirs or successors, in respect of any judgment, statute, or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they had, hath, or have become or shall become a debtor or accountant, or debtors or accountants to the Crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance [or other instrument—*Qy.*] as aforesaid."

This enactment, it will be observed, does not expressly provide for the several cases of Crown debts and liabilities and judgments affecting annuitants, legatees, judgment creditors themselves, vendors claiming a lien in respect of unpaid purchase-money (*y*), and all other persons, having pecuniary charges upon land, except mortgagees; but there

Remarks on
18 & 19 Vict.
c. 15, s. 11.

(*y*) See and consider *Hood v. Hood*, wording of 17 & 18 Vict. c. 113.
3 Jur. N. S. 681; and the similar

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can be little or no doubt that persons claiming, not as mortgagees strictly so called, but under securities by way of conveyance in trust to sell, or operating only to create a charge or incumbrance, without conferring any right of foreclosure (2), come within its provisions. Doubts may, however, be suggested whether it provides for the simple case of paying off a mortgage, without reference to a sale or a re-mortgage; or for the case of a transfer, where the mortgage is not paid off, but the debt is assigned and kept on foot, as is often desirable even upon a sale; or for the case of judgments against a puisne mortgagee whose concurrence is required to a sale of part of the land, although the purchase-money is received by the first incumbrancer; or for the case of a mortgagee releasing part of the land in consideration of a substituted security being given for the debt, or in reliance on the sufficiency of his remaining security. Nor does it appear, so clearly as could be wished, that a sale by a mortgagee, under the usual power, of part of the land, when the sale realizes only a portion of the mortgage debt, is within the enactment; but there can be no reasonable doubt that it would be held to be so; as the mortgagee would in fact be paid off, *quæ* the particular land comprised in the sale. It has been held under this section that, whether the mortgage be prior or subsequent to the passing of the Act, a *bond fide* purchaser acquires a valid title as against registered judgment creditors of the mortgagees, provided that the mortgage be paid off previously to, or at the time of, the execution of the conveyance (a).

Judgment is a charge on unpaid purchase-money, &c.

A judgment entered up against the vendor after a contract for sale, as formerly, may be enforced against the unpaid purchase-money; although execution cannot be levied upon it (b); and, upon a sale by a mortgagee, the surplus proceeds of sale may be resorted to for the discharge of judgments entered up against the mortgagor subsequently to the mortgage (c).

(2) See *Bell v. Carter*, 17 Beav. 11;
In re Underwood, 3 K. & J. 745.

(b) *Brown v. Perrell*, 4 Beav. 585.

(c) *Robinson v. Hedger*, 13 Jur. 846;

(a) *Greene v. Wilson*, 4 Jur. N. S. 802, 25 Beav. 434.

14 Jur. 784, V.-C. S.

A judgment creditor is not a purchaser for value within the 27 Eliz. c. 4, so as to avoid a prior voluntary settlement (*d*).

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Not a sale for value within 27 Eliz. c. 4.

Nor does a judgment operate as a charge upon an ecclesiastical benefice; the words "rectories and tithes," in the 11th and 13th sections of the 1 & 2 Vict. c. 110, having reference only to lay rectories and tithes (*e*).

Not a charge on an ecclesiastical benefice.

But a judgment on a bond of a municipal corporation will operate as a charge on all lands and hereditaments of the corporation (*f*).

A charge on municipal lands.

We may here remark that, by a recent statute (30 & 31 Vict. c. 127, s. 4), the rolling stock and plant of a railway company are for the future protected from being taken in execution; but a receiver, and, if necessary, a manager of the undertaking, may now be appointed, on the petition of the judgment creditor; and the moneys paid to such receiver or manager will be applied and distributed under the direction of the Court of Chancery.

Railway plant exempted from execution.

We have already seen that the judgment creditor can now take under an *elegit* the entirety, instead of a mere moiety, of the debtor's land; and that several kinds of property, which were not extendible under the old law, are now liable to be taken in execution. It does not, however, appear, that the creditor has acquired any remedy at Law against equitable estates, except in cases of simple trusts in favour of the debtor: *e.g.*, it is conceived that an equity of redemption cannot be taken in execution; but that land held simply in trust for the debtor at the date of the judg-

Creditor's extended rights at Law;

(*d*) *Beavan v. Lord Oxford*, 2 Jur. N. S. 121; 6 De G. M. & G. 507; see, as to Ireland, 12 & 13 Vict. c. 95, s. 6.

(*e*) *Hawkins v. Gathercole*, 6 De G. M. & G. 1; reversing 1 Sim. N. R. 63; and see *Long v. Storie*, 3 De G. &

S. 308; *Cottle v. Warrington*, 2 Nev. & M. 227; *Dates v. Brothers*, 2 Sm. & G. 509; and *Wise v. Beresford*, 3 Dru. & W. 276.

(*f*) *Arnold v. Mayor, &c. of Gravesend*, 2 K. & Jo. 574; but see *Arno v. Ridge*, 13 C. B. 745.

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ment can be taken in execution, notwithstanding intermediate alienation (otherwise than to an alienee for valuable consideration, and without notice).

in Equity.

In Equity, the judgment creditor is, under the 13th section of the 1 & 2 Vict. c. 110, to have the same remedies against the hereditaments charged, as he would be entitled to if the person against whom the judgment has been entered up had power to charge, and had in writing agreed to charge, the same hereditaments with the amount of the judgment debt and interest: but he is not to proceed in Equity to obtain the benefit of such charge, until a year has elapsed from the entering up of the judgment. A written agreement to charge being in Equity identical in effect with an actual charge, the judgment creditor is by this section placed in the position of an equitable incumbrancer under a memorandum of charge, subject only to the restriction as to the time when his judgment charge is to be enforceable. It is not, however, necessary that a year should have elapsed since the registration of the judgment (*g*); and the Court will, within the year, interfere at the suit of the judgment creditor, to prevent the destruction of the property, although no substantial relief can be obtained until the year has expired (*h*); but a writ of *elegit*, and not merely a *fi. fa.*, must have previously issued (*i*).

Registration
does not operate
retrospec-
tively.

Registration has no retrospective effect, so as to make the judgment, when registered, operate against purchasers or mortgagees as a charge from the date of its being entered up (*k*). So a certificate of the taxation of costs must be registered, and operates only from the date of registration (*l*).

(*g*) *Derbyshire, &c. R. Co. v. Bainbridge*, 15 Beav. 146.

(*h*) *Yeocon v. Lander*, 28 Beav. 80; *Partridge v. Foster*, 10 Jur. N. S. 741; 34 Beav. 1; and see *Watts v. Jeffreys*, 5 M. & G. 372; *Re Duke of Newcastle*, L. R. 3 Eq. 700.

(*i*) *Smith v. Hurst*, 1 Coll. 705; 10

Ha. 30; and see cases cited in last note, and *Neale v. Duke of Marlborough*, 3 Myl. & C. 407, 415; *Godfrey v. Tucker*, 33 Beav. 230.

(*k*) *Hargrave v. Hargrave*, 23 Beav. 484.

(*l*) *S. C.*

It has been much doubted whether the proper remedy, in Equity, for the judgment creditor, is sale or foreclosure (*m*). In one case, where the authorities were fully reviewed, it was held by V.-C. Wood that the proper remedy for an equitable mortgagee, who has not an agreement for a legal mortgage—a position analogous to that of the judgment creditor—is sale, and not foreclosure (*n*); and this decision was generally accepted and followed. But in a very recent case (*o*) it was held on the authority of an unreported case of *Pryce v. Bury* (*p*) before the Court of Appeal, that the appropriate remedy for an equitable mortgagee is foreclosure, not sale.

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Whether in Equity the remedy is sale or foreclosure.

But the 27 & 28 Vict. c. 112, has provided a more summary remedy, in Equity, for the judgment creditor. By the 4th section it is enacted, that every creditor, to whom any land of his debtor shall have actually been delivered in execution by virtue of any judgment under that Act, and whose writ, or other process of execution, shall be duly registered, shall be entitled forthwith, or at any time afterwards, while the registry of such writ or other process shall continue in force, to obtain from the Court of Chancery by petition (*q*), in a summary way, an order for sale of his debtor's interest in such land; and every such petition may be served upon the debtor only; and thereupon, the Court is to direct all necessary and proper inquiries as to the nature and particulars of the debtor's interest in the land, and his title thereto; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the Court, with respect to sales of real estates of deceased persons for the payment of debts, is to be adopted and followed, so far as the same may be found con-

Summary order for sale may now be obtained in Equity.

(*m*) Sale directed in *Footner v. Sturgis*, 5 De G. & S. 736; *Simpson v. Morley*, 2 K. & J. 71; *Smith v. Hurst*, 10 Ha. 50; and see *Carlton v. Farlar*, 8 Beav. 525. Foreclosure directed in *Jones v. Bailey*, 17 Beav. 582; *Ford v. Wastell*, 6 Ha. 229; *Messerv. Boyle*, 21 Beav. 559.

(*n*) *Tuckley v. Thompson*, 1 J. & H. 126. But see *Seton*, p. 449.

(*o*) *James v. James*, L. R. 16 Eq. 153.

(*p*) L. R. 16 Eq. 153, n.

(*q*) For form of petition, see *Dan. Ch. Forms*, 896.

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veniently applicable. If, on making such inquiries, it appears that any other debt due on any judgment, &c., is a charge on the land, the creditor entitled to such charge (whether prior or subsequent to the charge of the petitioner) is to be served with notice of the order for sale, and after such service is to be bound thereby; and the proceeds of such sale are to be distributed among the persons who may be found entitled thereto according to their respective priorities (r); and all parties claiming interest through the debtor are to be bound by the order for sale (s). These provisions, it must be observed, are merely prospective; and a creditor, to whom the land has been delivered in execution under a judgment entered up prior to the Act, is not entitled to a summary order for sale (t).

Construction
of the 27 & 28
Vict. c. 112

The true construction of the 27 & 28 Vict. c. 112, is by no means obvious. By the first section, to which we have already referred, no judgment is to *affect any land* of whatever tenure until it has been *actually delivered in execution* by virtue of a writ of *elegit*, or other lawful authority (u), in pursuance of such judgment; and the summary remedy provided by the 4th section is expressly confined to cases where there has been such an actual delivery. These provisions, if construed literally, and without reference to the context, can only mean that, except in the comparatively few cases where the debtor's land is capable of being delivered in execution, and has actually been so delivered, no future judgment was to operate as a charge on land. But the object of the Statute; as stated in the preamble, is to assimilate the law affecting freehold, copyhold, and leasehold estates, to that affecting purely personal estate in respect of future judgments; and if the Legislature had intended at once to deprive the judgment creditor of all his extended remedies under the 1 & 2 Vict. c. 110, this would surely

(r) Sect. 5.

(s) Sect. 6.

(t) *Re the Earl of Wight Ferry*, 11 Jur. N. H. 279.

(u) As to the meaning of which, see *Hilton v. Haywood*, L. R. 9 Ch. Ap. 220; *In re South*, L. R. 9 Ch. Ap. 373, and *infra* p. 478.

have been provided for by express enactment, and not have been left to mere surmise. Moreover, by the 2nd section the term "land" is to include incorporeal hereditaments, and *any* interest, *e.g.*, a reversionary interest, in corporeal hereditaments (*i.e.*, property not capable of being taken in execution); and the 5th section speaks of charges "*prior or subsequent to the charge of the petitioner.*" Clearly, therefore, the Statute contemplates the case of a judgment creditor, who may acquire a charge under the Act, and be entitled to the summary remedy in Equity which it provides, although not in actual possession under a writ of *elegit* (*v*).

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In two recent cases, in which the question of what was intended by "actual delivery" was very fully considered, it was held that, before a judgment creditor can apply by petition under the Act, he must have got that which is the nearest equivalent to being put in possession, *viz.*, a return to the writ actually placed in the hands of the sheriff (*x*); but he is not prevented from filing a bill to redeem a prior judgment creditor to whom the land has been delivered: and, having thus removed the legal obstacle, he may then petition for a sale under the Statute (*y*); and that the priorities of the judgment creditors *inter se* are determined not by the dates of the judgments, but by the dates at which the writs are placed in the hands of the sheriff (*z*).

Cases of the
Cowbridge R.
Co.

In a later case of *In re the Duke of Newcastle* (*a*), the Duke was entitled to an equitable life interest in a leasehold messuage; a judgment creditor, having issued a writ of *fi. fa.*, under which the sheriff entered and sold the debtor's goods, presented a petition, while the sheriff was in possession, for a summary order for sale of the Duke's interest in the

re Duke of
Newcastle.

(*v*) See now *Hutton v. Haywood*, L. R. 9 Ch. Ap. 229; *In re South*, *ib.* 373.

(*x*) *Re Cowbridge R. Co.*, L. R. 5 Eq. 413; *Guest v. Cowbridge R. Co.*, L. R. 6 Eq. 619. But see now and consider *Hutton v. Haywood*, L. R. 9 Ch.

Ap. 229.

(*y*) *Re Cowbridge R. Co.*, *ubi supra*; see and compare *Horsley v. Cox*, L. R. 4 Ch. Ap. 92.

(*z*) *Guest v. Cowbridge R. Co.*, *ubi supra*.

(*a*) 18 W. R. 8; L. R. 8 Eq. 700.

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house, under the 4th section of the 27 & 28 Vict. c. 112 Lord Romilly held, first, that the Duke's interest could not be taken in execution under a writ of *fi. fa.*; and, secondly, that the summary relief provided by the 4th section of the Act of 1864 applies only in cases where there has been an actual delivery in execution.

Remarks
in these cases.

In the cases to which we have just referred, the Court, it will be seen, treated the words "actually delivered in execution" as used in their strict technical sense, and not as importing what we may term an equitable delivery of the land in execution; and accordingly, applying a *cy-près* rule, held that an enforcement of the legal process down to the sheriff's return to the writ, was, as respects the debtor's equitable interest, a delivery in execution within the meaning of the Act

Hutton v. Haywood

But in a very recent case of *Hutton v. Haywood* (b), a new construction has been put upon the Statute. In that case a judgment creditor sued out an *elegit* against his debtor, whose only interest in land was an equity of redemption. After the sheriff had returned *nil*, the debtor was adjudicated bankrupt, and the judgment creditor then filed his bill against the trustee for a declaration of charge in the debtor's equitable interest, and for consequential relief. The Court of Appeal, affirming V.-C. Malins, who had allowed a demurrer to the bill, laid it down that the term "delivery in execution" must be understood according to the subject-matter,—that it was not confined to a delivery at law by the sheriff; but that a delivery, or what was tantamount to a delivery, "by any other lawful authority," satisfied the language of the Statute; and consequently that the relief given by a Court of Equity, whether by way of a writ of assistance or sequestration or the appointment of a receiver, is substantially a delivery in execution within the Act (c).

(b) L. R. 9 Ch. Ap. 229; *In re Smith*, L. R. 9 Ch. Ap. 378.

(c) L. R. 9 Ch. Ap. 378: where the property was an estate in remainder

According to this decision, which has been followed in the later case of *In re South (d)*, a judgment creditor who cannot obtain possession of the land under the *elegit* has no charge upon his debtor's interest in it until he has obtained some relief, either by a decree, or, it is conceived, by an interlocutory order of the Court of Chancery, in a suit to enforce his equitable charge. If this be so, there can, it is conceived, be no reason why he should be required in the first instance to go through the idle form of prosecuting legal remedies, which can be productive of no result, instead of at once availing himself of his only effectual means of relief (*e*); or why the priorities of judgment creditors *inter se* should be determined according to the dates at which the writs are placed in the sheriff's hands, and not by the order in which they obtain an effectual charge on the land or the debtor's equitable interest in it.

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In a very recent case (*f*), Sir George Jessel, M.R., held that a judgment creditor, who, by reason of an outstanding legal estate or incumbrance, could not obtain possession of the land under his *elegit*, was not bound to file a bill for redemption; but might, in a suit to which the debtor and subsequent incumbrancers were alone parties, obtain a decree for the appointment of a receiver and a sale of the property (*g*).

Where it is not clear that the debtor has a saleable interest in the land delivered in execution, the Court will not order an immediate sale; but will direct inquiries as to the nature of the debtor's interest: and if it should be found unsaleable, the case appears not to fall within the 4th section (*h*).

When a sale
will be ordered
under 27 & 28
Vict. c. 112.

(*d*) *ubi suprad.*

(*e*) And as to the necessity of first pursuing the legal remedy before resorting to Equity, see *Wallis v. Morris*, 10 Jur. N. S. 741; *Godfrey v. Tucker*, 9 Jur. N. S. 1188; *Partridge v. Foster*, 34 Beav. 1; *Thomas v. Cross*, 2 Dr. & Sm. 523.

(*f*) *Wells v. Kilpin*, L. R. 18 Eq. 298; but see and compare *James v. James*, L. R. 16 Eq. 153.

(*g*) See L. R. 18 Eq. 300, for form of decree.

(*h*) *In re Bishop's Waltham R. Co.*, L. R. 2 Ch. Ap. 362; and as to form of order for sale of superfluous lands of a railway company under this section, see *Re Hull and Hornsea R. Co.*, L. R. 2 Eq. 262; and *Gardner v. London, Chatham, and Dover R. Co.*, L. R. 2 Ch. Ap. 385.

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Judgment
creditor post-
poned to *cestui
que trust*, or
prior equitable
incumbrancer.

When it is said that a judgment operates as a charge upon land, what is meant is, that where a debtor has merely a modified or qualified interest in the lands,—as where he holds them wholly or in part as a trustee or subject to any previous incumbrance whether legal or merely equitable,—the judgment must be considered as the statutory equivalent to his written agreement to charge, not the lands themselves, but merely that which he may rightfully charge, *viz*, his beneficial interest (if any) in them; so that the judgment creditor, although he subsequently acquire the legal estate, is postponed to a *cestui que trust*, or a prior equitable incumbrancer who advanced his money upon the security of the specific property.

Where judgment creditor, prior to registration, has notice of a charge.

And it may be surmised that a judgment creditor registering with notice of a charge created by the debtor, even subsequently to judgment being entered up, would be postponed to such charge of Equity (i)

In one case (j) it was held that judgment creditors, whose judgments were not a charge on the land at the date of the decree in a foreclosure suit, were entitled to redeem if, within the six months allowed for redemption they issued writs of *elegit*: but, in a late case (k), this decision was disapproved; and it was held that judgment creditors who had not issued execution were not necessary parties to a foreclosure suit

Watts v.
Porter.

In a modern case, a majority of the Court of Queen's Bench held that a mortgage of an equitable interest in stock, where the mortgagee had omitted to give notice of the charge to the trustees, must be postponed to a charging order obtained under the 14th section by a subsequent registered judgment creditor (l). This case, although professedly de-

(i) See and consider *Warburton v. Hill*, Kay, 470; and see *Haly v. Barry*, L. R. 3 Ch. Ap. 452, and Sir W. P. Wood's explanation of his judgment in *Warburton v. Hill*; see, too, *Deane v. Keane*, 1 J. & H. 685;

3 De G. F. & Jo. 318.

(j) *Mildred v. Austin*, L. R. 8 Eq. 220.

(k) *Earl of Gwent v. Russell*, L. R. 13 Eq. 210.

(l) *Watts v. Porter*, 5 El. & B. 373.

cided in accordance with the decisions above referred to, on the 13th section, is very difficult to be reconciled with them; and the masterly judgment of the dissentient member of the Court, Erle, J., offers reasons in support of his opinion which many will deem to be unanswerable (*m*).

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In a later case, it was held that a judgment entered up by an heir for his own debt, before any action or suit by simple contract creditors of the ancestor, had no priority over their claims under the 3 & 4 Will. IV. c. 104, in respect of the descended real estate (*n*). So, an equitable assignee of stock, whose mortgage was subsequent to the judgment, but before the charging order, was held entitled to priority over the judgment creditor, although he had omitted to give notice of his security (*o*); and, in a later case, it was laid down, that where a judgment creditor had notice of a prior mortgage, or a mortgagee has notice of a prior unregistered judgment, each was equally postponed; in the former case, because the debtor had parted with his interest; in the latter, because the mortgagee, having notice of the prior incumbrance, could not, by contract, place himself in a better position than his mortgagor, who might not derogate from an interest which he had already created (*p*): but that as between judgment creditors this principle had no application; the judgment creditor gaining his position by proceedings *in invitum*; so that, notwithstanding notice of a prior unregistered judgment, his judgment, if first registered in the County Register, would have priority (*q*). So, under the 27 & 28 Vict. c. 112, the priority of judgment creditors *inter se* is regulated according to the times when the several writs are placed in the sheriff's hands (*r*). Where, however, the

Recent cases.

Priorities of
judgment
creditors *inter
se*;

under the Act
of 1864.

(*m*) And see judgment in *Beavan v. Lord Oxford*, 2 Jur. N. S. 121; 6 De G. M. & G. 492, 524, 525, 532; where the decision in *Watts v. Porter* was disapproved. And see under the equivalent Irish Acts, *Eyre v. Mc Donnell*, 9 H. L. C. 619, 642.

(*n*) *Kinderley v. Jervis*, 22 Beav. 1.

(*o*) *Scott v. Lord Hastings*, 4 K. & Jo. 633; see V.-C. Wood's judgment;

and see *Italy v. Barry*, L. R. 3 Ch. Ap. 452, and cases there cited; *Breardcliff v. Dorrington*, 4 De G. & S. 122.

(*p*) *Benham v. Kenne*, 1 John & H. 685; 3 De G. F. & Jo. 318; *Nere v. Flood*, 23 Beav. 666.

(*q*) *S. C.*

(*r*) *Guest v. Cowbridge R. Co.*, L. R. 6 Eq. 619, *supra*.

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transaction, though in form a judgment, is in truth a contract, as where money is agreed to be advanced upon the security of certain land, and the judgment is only the mode of carrying out the contract, the principle above stated would probably be held to apply (*s*).

Taking creditor in execution discharges judgment.

We may also remark that a judgment, upon which execution has not issued, is discharged if the creditor takes or detains the debtor's body in execution (*t*): and the Court will compel the creditor to attend and consent to a memorandum of the fact being made in the Master's book at the Common Pleas (*u*): but no such effect is produced by the debtor being taken into custody under an attachment for non-payment of money pursuant to a registered decree of the Court of Chancery (*x*); and a creditor who has sued out an *elegit*, cannot afterwards avail himself of a *fi. fu.* (*y*).

Judgment, how affected by bankruptcy.

In case of bankruptcy, the judgment creditor, under the 13th section of the 1 & 2 Vict. c. 110, had all the rights of an equitable mortgagee, provided that the judgment was entered up at least twelve months before the bankruptcy (*z*); although registration might have been delayed until shortly before the act of bankruptcy (*v*); so that it was sufficient to extend the search against the bankrupt over a period of one year prior to the bankruptcy. In the case of a judgment entered up under a warrant of attorney, and of the subsequent insolvency of the debtor, the judgment creditor's security was held to be not affected by the 61st section of the Act (*b*).

Under recent Act.

Under the Bankruptcy Act of 1869 no creditor in respect

(*s*) *Benham v. Crane*, *ubi supra*; and see *Croft v. Lumley*, 6 H. L. Cam. 673.

(*t*) See 1 & 2 Vict. c. 110, s. 16; *Hodgkiss v. Collins*, 5 Beav. 497.

(*u*) *Lewis v. Dyson*, 16 Jur. 222.

(*x*) *Roberts v. Ball*, 1 Jur. N. S. 685.

(*y*) *Stallanley & Smith*, 4 W. R.

511.

(*z*) Sect. 13 of Act; and see *Rollison v. Merion*, 1 Dru. & W. 195.

(*a*) *Re Boyle*, 2 De G. M. & G. 515.

(*b*) *Hotham v. Sanderville*, 9 Beav. 63; *Robinson v. Hedger*, 17 Sim. 183; 13 Jur. 846; 14, Jur. 784. But see 24 & 25 Vict. c. 134, Sched. G.

of a debt, provable under the bankruptcy, is to have any remedy against the property or person of the bankrupt, except in the mode directed by the Act; but this provision is not to affect the power of creditors holding security to realize or deal with the same (c). A judgment creditor who, at the date of the bankruptcy, has not obtained an actual delivery of the bankrupt's land, or what is tantamount to delivery within the rule laid down in *Hatton v. Haywood* (d), has no longer any charge upon the debtor's land, and must, it is conceived, rank as an ordinary creditor under the bankruptcy.

By the 11th section of the 22 & 23 Vict. c. 35, the release from a judgment of part of any hereditaments charged therewith, is not to affect the validity of the judgment as to the hereditaments remaining unreleased; but this provision, is not to affect the rights of persons interested in the hereditaments remaining unreleased (e).

Release of part of land charged not to affect judgment.

The remedies of the judgment creditor, under the new law, depend, as we have seen, upon the due registration of the judgment, or, under the Acts of 1860 and 1864, of the writ of execution. By the 19th & 21st sections of the 1 & 2 Vict. c. 110, no judgment, decree, order, or rule, was by virtue of the Act, to affect any lands, &c., as against purchasers, mortgagees, or creditors, unless and until a memorandum thereof was left for registration with the senior Master of the Common Pleas at Westminster, or, (in the case of a judgment obtained in the Courts of Lancaster or Durham,) with the prothonotary, or deputy prothonotary, or other appointed officer of such Courts respectively (f), who was *forthwith* to enter the same in the Register Book; and by the 2 & 3 Vict. c. 11, the old dockets were closed, and judgments then docketed were not to affect lands, &c., as against purchasers, mortgagees, or creditors, after the 1st

Remedies under new law depend upon registration.

1 & 2 Vict. c. 110.

2 & 3 Vict. c. 11.

(c) 32 & 33 Vict. c. 71, s. 12; and see sect. 95.

(d) *Vide supra*, p. 478.

(e) See the Irish Act, 11 & 12 Vict.

c. 48, s. 72; *Handcock v. Handcock*, 1 Ir. Ch. R. 444.

(f) See as to Palatinate judgments, 18 & 19 Vict. c. 15.

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August, 1841, until a memorandum thereof was left for registration at Westminster under the 1 & 2 Vict. c. 110; and as respects judgments registered at Westminster, a fresh memorandum was required to be left for registration every five years (*g*); so that in no case need a search at Westminster extend back for more than five years; but the search for the five years preceding the purchase should theoretically be made, not only as against the present vendor, but also against former owners, although more than five years may have elapsed since they parted with the property (*h*).

Whether creditor is bound to see that his judgment is registered.

It has been suggested (*i*), (and the strict grammatical construction of the Act seems to favour the view,) that a judgment may be binding on a purchaser, notwithstanding that, through the neglect of the proper officer, it may not have been registered; and that the purchaser, if damnified by the omission, must seek his remedy against the officer (*k*). But the Legislature seems to have contemplated that the leaving of the memorandum and its entry would form but one transaction; and, without doing any great violence to the words of the Act, it may well be held that an implied obligation is thrown upon the creditor of seeing that there is an actual entry (*l*).

Registration of writs of execution under the Act of 1860.

By the first section of the 23 & 24 Vict. c. 38, which is not retrospective (*m*), before a judgment can affect land (of whatever tenure), as against a purchaser or mortgagee, whether with or without notice, a writ of execution must have been issued, and registered before the conveyance or mortgage: and the execution must be put in force within three calendar months from the date of the registration of the writ: and by the 2nd section a memorandum is to be left with the senior Master of the Common Pleas, who is to

(*g*) See ss. 1, 2, and 4 of 2 & 3 Vict. c. 11.

(*h*) See as to misnomer, *Beaman v. Lord Oxford*, 1 Jur. N. S. 155; 3 Sm. & G. 11; *vide infra*, p. 491.

(*i*) *Prid. Jud.* 719.

(*k*) *Douglas v. Yallop*, 2 Burr. 722.

(*l*) But see *M'Minn v. M'Connell*, 2 Ir. Ch. Rep. 609.

(*m*) *Vide supra*, p. 464; and see *Evans v. Williams*, 2 Dr. & S. 324.

enter the particulars in a book in the name of the person *on whose behalf* the writ was issued; and all persons are to be at liberty to search this book, in addition to all the other books in the same office, on payment of the sum of one shilling. These provisions are extended to the Palatine Courts, but not to Ireland.

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Under this Statute a registered judgment, under which the land has not been actually delivered in execution, instead of being a charge of indefinite duration, if kept alive by the process of re-registration, was made a charge upon the land only while a writ of execution was in force, *viz.*, for a period of three calendar months from the date of registration. There is no provision for the re-registration of the writ at the end of the three months, and it is the practice at the office to refuse re-registration, as not being authorized by the Statute (*n*); but there would seem to be nothing to prevent the registration of a second, or any subsequent, writ on the same judgment.

Cannot be registered at the end of the three months;

but a fresh writ on the same judgment may be registered *semble*.

By the 27 & 28 Vict. c. 112, which also is merely prospective, the writ of execution is to be registered in the name of the *debtor*, thus avoiding the necessity of a double search; and no prior or other registration of the judgment is to be deemed necessary *for any purpose*: and the summary relief provided by the 4th section, must be obtained *while the registry of the writ continues in force*. As this Act, like the 23 & 24 Vict. c. 38, does not provide for re-registration of the writ, the meaning of this qualifying expression is far from clear, and will doubtless form the subject of judicial decision.

Registration under the Act of 1861.

Where a judgment is re-registered after the expiration of more than five years from the date of the last registration, there is nothing in the 2 & 3 Vict. c. 11, to affect its validity, except as against purchasers or mortgagees claiming under an instrument executed between the expiration of such

Neglect to re-register within five years—effect of.

(n) See *Park* on these Acts, p. 9.

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period of five years and the subsequent registration (o). Any doubts which had existed were prospectively removed by the 6th section of the 18 & 19 Vict. c. 15, s. 6, which enacted that it should be sufficient to bind purchasers, &c., if a minute were again left with the senior Master of the Common Pleas within five years before the execution of the conveyance, &c., although more than five years should have expired by effluxion of time since the last previous registration before such minute was left; and so *toties quoties* upon every re-registry.

Provisions as to registration not merely for the benefit of immediate purchasers, &c.

We may also remark that the provisions as to registration are operative, not merely for the protection of the debtor's immediate purchasers and mortgagees, but also for the benefit of all derivative *bond file* purchasers and mortgagees (p): but where a purchaser or mortgagee has once been duly bound by notice of a registered judgment, the neglect of re-registration within the five years will not relieve him. It is hardly necessary to observe that where the title is derived otherwise than through the judgment creditor, as, *e.g.*, in the case of a lord taking by escheat, the statute does not apply.

Re-registra-
tion of judg-
ments in Pala-
tinate Courts.

No provision was originally made for the fresh registration of judgments, &c., in the Palatinate Courts of Lancaster and Durham; the 4th section of the 2 & 3 Vict. c. 11, referring merely to those judgments, &c., which must be originally registered with the senior Master of the Court of Common Pleas at Westminster; but this omission was supplied by the 18 & 19 Vict. c. 15 (q). We may here remark, that since lands in a County Palatine may be extended on a judgment obtained in one of the superior Courts at West-

(o) *Beason v. Lord Oxford*, 1 Jur. N. S. 1421; 6 De G. M. & G. 492; *Shaw v. Neale*, 6 H. L. Cas. 581; overruling 30 Beav. 157, and *Freer v. Shaw*, 4 De G. M. & G. 495; and see *Simpson v. Worley*, 1 Jur. N. S. 1158; 1 K. & Jo. 71; and see 18 & 19 Vict.

c. 15, s. 6.

(p) *Benham v. Beane*, 1 J. & H. 685; 3 De G. F. & Jo. 313. See and consider judgments.

(q) See sect. 3; and see now 23 & 24 Vict. c. 83, s. 2.

minster, it will be proper to search the Westminster Register in addition to the local Register.

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There were also grounds for contending that judgments registered in the Palatinate Courts (*r*) had their full effect under the 1 & 2 Vict. c. 110, even as against purchasers and mortgagees without notice; inasmuch as the words "as aforesaid," in the 5th section of the 2 & 3 Vict. c. 11, seem to identify the judgments, decrees, &c., mentioned in that section, with those mentioned in the preceding section; and those, as before observed, appear to be such only as are required to be registered with the senior Master of the Common Pleas at Westminster; and a similar question seemed to arise as to the applicability of the 2nd section of the 3 & 4 Vict. c. 82, to Palatinate judgments: but both these points were provided for by the 18 & 19 Vict. c. 15.

Judgments in Palatinate Courts — whether binding on purchasers without notice.

A purchaser with notice of an unregistered judgment is protected (*s*) from the additional remedies of the judgment creditor under the 1 & 2 Vict. c. 110; and, since the old dockets are closed, he is equally safe from any remedy which, under the old law, depended upon docketing; but it was conceived to be doubtful whether a purchaser with notice of an unregistered judgment was not still bound in Equity to the same extent as he would have been bound under the old law by notice of an undocketed judgment (*t*); for instance, whether, if purchasing from an owner in fee simple, he would not be liable in Equity to have a moiety of the land subjected to the claim of a creditor of whose unregistered judgment he had notice at the time of advancing his money; although, if purchasing under a power of appointment, he might altogether disregard unregistered judgments against the vendor of a date subsequent to the creation of the power; inasmuch as, under the old law, the

Purchaser with notice of unregistered judgment, how far liable.

(*r*) See as to decrees of the Lancaster Court of Chancery, 13 & 14 Vict. c. 43, s. 24; 23 & 24 Vict. c. 38, s. 2.

(*s*) 3 & 4 Vict. c. 82; *quære*, as to

Palatinate judgments, *vide supra*.

(*t*) But see *Beere v. Head*, 3 J. & L. 340; *Re Huthwaite*, 2 Ir. Ch. R. 54.

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exercise of the power defeated such judgments as well in Equity as at Law. It was even made a question whether a purchaser might not at Law be bound by a judgment neither docketed nor registered in the same way as he would have been bound by it before the Act of William and Mary (*u*): but the point did not seem to be one of real difficulty: except as respects Palatinate judgments which never required docketing (*x*). Both these points are now disposed of in the negative (*y*).

Purchaser
with notice of
a docketed
judgment not
registered
under 1 & 2
Vict. c. 110,
how far liable

It was the opinion of Lord St Leonards that where a judgment had been once docketed under the old Acts, but had not been registered under the 1 & 2 Vict. c. 110, or where a judgment having been registered under that Act had not been re-registered at the end of five years, under the 2 & 3 Vict. c. 11, a purchaser for value, although aware of its previous docketing or registration, might presume that it has been satisfied (*z*): and this principle was carried out in the 18 & 19 Vict. c. 15 (*a*).

Local regis-
ters, whether
affected.

It was held by Lord Cranworth, V.-C., in a case under the West Riding Register Act (*b*), that a judgment creditor, duly registering under the 1 & 2 Vict. c. 110, but omitting to register under the Local Act, is not an incumbrancer upon the land at Law or in Equity (*c*): in a later case, under the Middlesex Act (*d*), V.-C. K. Bruce declined to follow this decision (*e*): but it is now clearly settled that the Local Registry Acts have not been repealed by the judgment Acts (*f*).

(*u*) Coote on Mortgages 50. And see *Jortin v. South Eastern R. Co.*, 6 De G. M. & G. 275.

(*x*) See Williams R. P. 4th Ed. p. 68.

(*y*) 18 & 19 Vict. c. 15, ss. 4, 5.

(*z*) *Beere v. Head*, 3 J. & L. 340; and see *Beilford v. Forbes*, 1 Car. & K. 53 (Cresswell); and, upon the Irish Acts, *Knox v. Kelly*, 1 D. & Wal. 542; *Hickson v. Collis*, 1 J. & L. 94; *Ex parte Belfast Harbour Commissioners*, 5 Ir. Jur. 35.

(*a*) See sect. 5.

(*b*) 5 Anne, c. 18.

(*c*) *Johnson v. Holdsworth*, 1 Sim. N. S. 106.

(*d*) 7 Anne, c. 20.

(*e*) *Robinson v. Woodcock*, 4 De G. & S. 562.

(*f*) See *Benham v. Keane*, 1 J. & H. 685; 3 De G. F. & Jo. 218; in which the prior decisions were fully reviewed; and see *Nere v. Flood*, 83 Beav. 666; *Westbrook v. Rhythe*, 3 El. & B. 737.

The 23 & 24 Vict. c. 115 (g), has provided greater facilities for entering on the register satisfaction of a registered judgment, *lis pendens*, decree, order, rule, annuity, rent-charge, or writ of execution, and for the issue of certificates of the entry of such satisfaction. Where the requirements of this Statute cannot be complied with, a rule or order of a Court of Common Law or Equity directing satisfaction to be entered upon the record of the judgment, must be obtained (h).

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Satisfaction of judgments—how entered up.

By the 31 & 32 Vict. c. 54, facilities have been given for enforcing judgments obtained in one part of the United Kingdom in the Courts of another part. When judgment has been obtained or entered up in any of the Courts of Westminster, a certificate thereof registered in Ireland is as from the date of such registration to have the effect of a judgment obtained or entered up there, or *vice versa*; and registers are provided for the entry of such certificates (i): so, also, judgments obtained or entered up at Westminster or in Ireland are in like manner to have the effect of a decree of the Court of Session in Scotland (k); and there is a similar provision as to the registration at Westminster and in Ireland of certified extracts of Scotch decreets (l); but in all these cases the certificate cannot, without special leave, be registered more than twelve months after the date of the judgment or decree; the Courts in which the certificates are registered are invested with the same powers as they possess in respect of their own judgments, but only so far as relates to execution under the Act (m).

Judgments obtained in one part of the kingdom enforceable in other parts.

We now return to the inquiry with which this digression commenced, *viz.*, how far the relation of vendor and purchaser is affected by the present law of judgments, and, in particular, what searches in respect of judgments ought to be made on behalf of an intending purchaser.

(g) Sect. 2.

(h) 16 & 17 Vict. c. 113, s. 144.

For the rules of the office as to entry of satisfaction, see Pask on the Judgments Law Amendment Acts, pp.

31 — 34.

(i) Sect. 1.

(k) Sect. 2.

(l) Sect. 3.

(m) Sect. 4.

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General effect
of recent
statutes on
the law of
judgments.

The natural effect of the restrictions and formalities which the later Statutes have imposed upon the judgment creditor as to the time and manner in which he may avail himself of his remedies, has been greatly to diminish the number of registered judgments (*a*). In the case of adverse judgments, or where the debtor is known to possess real estate, a judgment will still be registered; but it is no longer worth the creditor's while to register a roving judgment, in the hope that it may one day be found to affect land which he does not know his debtor to possess, and which cannot be dealt with until his claim is satisfied. In proportion to the number of searches made, the number of registered judgments and writs of execution found is extremely small; but although a purchaser is under no positive obligation to make a search, yet notice is so readily presumed, and with such difficulty disproved, that, notwithstanding the risk of omitting to make a search may in the particular instance be almost inappreciable, there are perhaps few cases in which the solicitor of an intending purchaser can be safely advised to dispense with it.

What searches
should be
made.

The search for judgments should be made for a period of five years. The register will disclose the date of entering up the judgment: if it was entered up before the 23rd July, 1860, and has been duly re-registered, the purchaser will still be bound by it, although no execution may have issued thereon, or been registered. If it was entered up between the 23rd July, 1860, and the 20th July, 1864, then a further search must be made in the creditors' name for a registered writ of execution; if any be found, it must be ascertained whether the writ has been executed; if it has not, and if three months have elapsed from the registration of the writ, both the registered judgment and writ of execution may be disregarded. If the judgment has been entered up since the 20th July, 1864, a search should be made in the debtor's name in the list of registered executions, whether his interest in the land can be reached by an *elegit* or not. If no

(a) See statistics given by Lord St. Leonard, p. 250.

execution has been registered at the date of completion, it is conceived that a registered judgment may be safely disregarded.

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And, although theoretically, a search ought to be made for five years preceding the sale in the names of former owners, with a view to the possibility of prior judgments having been entered up against them and kept alive by re-registration, it is not usual in practice, not even on purchases by the Court of Chancery, to make such a search, in the absence of special grounds for suspicion; nor to extend the searches to judgments against mortgagees or other incumbrancers, or mere equitable claimants upon the property. In fact, as a rule, subject, of course, as every rule is, to occasional exceptions, the searches advised by counsel are theoretically imperfect and practically useless.

When to be made in the names of prior owners.

This short review of the existing law of judgments naturally suggests the question, whether its benefits, as compared with its inconveniences, are such as to justify its continuance. The practice of entering up and registering a judgment as a security for money advanced, which had long fallen into desuetude, was virtually abolished by the Acts of 1860 and 1864; which, by depriving a judgment of its statutory force as a charge, unless immediate steps were taken to enforce it, rendered it impossible thus to create a continuing security on the land. The question, therefore, lies between those creditors who, in ordinary process of law, have recovered judgments against landowners, and the general body of vendors and purchasers, whose interest it is that there should be no unnecessary hindrance to the free circulation and transfer of land.

General remarks on the present state of the law.

Now, as a matter of principle, it must be admitted, that a debtor's land ought to be within reach of his creditors, as well during his lifetime as after his decease. There is, however, as regards the community at large, a wide difference in the practical application of this principle to the two cases of

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a creditor's suit instituted after the debtor's death, and the course of action against him under the existing law of judgments while he is living. In the former, the whole expense of fixing and discharging the liability falls upon his estate; in the latter, a burdensome tax is thrown upon the general body of vendors and purchasers, and, through them, upon the entire community. If the total amount recovered for judgment creditors in any one year, could be compared with the aggregate expense occasioned to purchasers during the same period, by the operation of the existing law, the latter, if we mistake not, would be found largely to exceed the former; and such a comparison would not, in any adequate degree, represent the hardship, uncertainty and inconvenience which are the necessary results of the present system. If, therefore, the uniform good of the community is to be preferred to the casual benefit of the individual, there can be no doubt that as a matter of public policy, the existing law of judgments ought to be swept away.

But even supposing this to be premature, there is at any rate room for great and immediate improvement in the existing system, and the following suggestions are offered with this view, *viz.*, that as a preliminary step to a new and more simple legislation, all the statutes now in force relating to the law of judgments should be at once repealed, with a saving for a limited period of the rights of judgment creditors under the existing system—that all hereditaments of the debtor, of whatever kind or tenure, and whatever may be the nature of his estate or interest therein, should be rendered liable to his judgment debts—that the term judgment should be precisely defined—that it should no longer be necessary to issue a writ of *elegit*, or to take any proceedings before the sheriff—that a judgment, if intended to operate as a charge on the land, should be registered in the debtor's name in the Common Pleas Office within a limited time (say fourteen days) from the date of its being entered up—that the judgment creditor should be at liberty, at any time within a limited period (say

three months) from the registration of the writ, to apply to the Court of Chancery, upon petition in a summary way, for an order for the sale of his debtor's interest, and the Court, should have such powers as to directing inquiries on, and service of, the petition, as are provided by the Act of 1864—that the presentation of every such petition should be registered in the debtor's name, in the Common Pleas Office—and until so registered should not in anywise affect any hereditaments of the debtor, notwithstanding that any person dealing with him may have actual notice of the entering up and registration of the judgment—and that purchasers and mortgagees, without notice of a registered petition, should be protected in the same way as under the existing law.

Wherever there is reason to suspect that the vendor may be a debtor or accountant to the Crown, search should be made (except in the case of copyholds) (*o*) for Crown debts and accountantships (*p*). The lien of the Crown, it may be observed, attaches as from the time when the owner of the land becomes an accountant. All freehold lands may be taken in execution by the Crown; and the lien extends to trust estates, and equities of redemption; nor can it be defeated by the execution of a power of appointment (*q*), or by the assignment of an attendant term already held in trust for the debtor or accountant (*r*); and the lands of an accountant are liable for moneys which become due from him even subsequently to alienation (*s*): and a purchaser, evicted by the Crown, will have no allowance made him for repairs and improvements (*t*); and although copyholds are not extendible on Crown process, the exemption does not extend to a lease of copyholds granted by license of the

(*o*) 8 Ves. 394.

(*p*) As to who are liable as accountants, see 33 Hen. VIII. c. 39; 13 Eliz. c. 4; 6 Geo. IV. c. 105, s. 13; 6 Geo. IV. c. 104, s. 7; Frid. on J. 159, *et seq.*; Shelford Real P. Stat., p. 596.

(*q*) Frid. on J. 154; Reg. v. Ellis. 4

Exch. 652; 6 Exch. 921.

(*r*) *Rex v. Smith*, Sugd. 543; *Rex v. Lamb*, 13 Pri. 649; *Reg. v. Ellis*, *ubi supra*.

(*s*) *Coxhead's case*, F. Moore, 126.

(*t*) *Rex v. Bailey*, cited Mann. Exch. P. 37, n.

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lord (u), or, it is conceived, by special custom of the Manor. But Crown debts do not affect the debtor's terms for years in gross, whether his estate be legal or equitable, until the *teste* of the extent (v); so that an intermediate alienation binds the Crown.

Registration
of.

Previously to the year 1839 a purchaser had no means of ascertaining whether his vendor was a debtor or accountant to the Crown. By the 8th section of the 2 & 3 Vict. c. 11, no bond given to the Crown is to affect the debtor's land until it has been registered. This section is not retrospective, and it may still occasionally be expedient to ascertain (if possible) by searches at the Exchequer Office, and among the Receiver-General's bonds at the Tax Office, that no such liability was subsisting before the 4th June, 1839, when the 2 & 3 Vict. c. 11 came into operation; but in practice such an inquiry is seldom, if ever, made.

Re-regis-try
of Crown
debts.

Re-registry of Crown debts was at first not required but by the 22 & 23 Vict. c. 35 (x), the provisions as to the re-registration of judgments were extended to Crown debts, so that in every case a search for five years will be sufficient.

Future
Crown debts
not to affect
land until writ
of execution
issued and
registered.

By the 28 & 29 Vict. c. 104 (y), future Crown debts are not to affect land as to a *bona fide* purchaser for value or a mortgagee, even with notice, until a writ of execution has been issued and registered; and a new mode of registration is provided. It is material to observe, that Crown debts become a charge upon the land immediately upon the registration of the writ; while, in the case of judgments, the land must have been actually delivered in execution before registration can be effected, or a charge created. The 28 & 29 Vict. c. 104 is not retrospective; and it is therefore still necessary to search for Crown liabilities of a date prior to the 1st November, 1865, and since re-registered; since that

Searches now
to be made.

(u) *Rolls v. Widdowson*, 12 B. & C. 125.
(v) *Re v. Earl*, 18 Pri. 659.

(x) Sect. 22.
(y) Sect. 46 et seq.

date the search must also, in appropriate cases, extend to executions, which are entered in the same register as executions under the 27 & 28 Vict. c. 112.

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The 2 & 3 Vict. c. 11 provided for the registration of a *quietus*, and for the discharge of the debtor's land, in certain cases, without prejudice to the claim of the Crown on the remainder; and now, under the 23 & 24 Vict. c. 115, satisfaction of a registered Crown debt will be entered up by the registrar, upon a certificate of the commissioners or principal officer of the public department holding the bond being filed at the office; but, in the case of railway bonds, it appears to be still necessary to obtain a judge's order before satisfaction can be entered up.

Entry of satisfaction.

A registered *lis pendens*, though not of itself an incumbrance, apart from the equity on which the litigation is founded, fixes an intending purchaser with notice of any adverse claim or unsatisfied charge, which may be the subject of the suit; and in every case the Common Pleas Register ought to be searched. If upon inquiry the suit is found not to involve any question of title or charge upon the property about to be dealt with, it may be safely disregarded. The mere existence of a registered *lis pendens*, apart from the question raised in it, is not a sufficient reason for refusing to complete a purchase (z).

Lis pendens.

The 2 & 3 Vict. c. 11, which introduced the practice of registering suits, provides that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby, and the title of the cause, &c., shall have been left for registration with the senior Master of the Common Pleas; and by the same Act a *lis pendens* becomes void against the lands, as to purchasers,

Registration of
— under 2 & 3
Vict. c. 11.

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mortgagees, or creditors, unless re-registered every five years (a); so that a search need only be made for that period. Whether it can be safely confined to the name of the immediate vendor, must depend upon the state of the title, and upon the purchaser being satisfied that, on prior sale-transactions, the usual searches have been made; and the like remark applies to the other searches now under consideration. In the case of a sale by trustees who have full power to sell, and to give discharges for the purchase-money, a search for *lis pendens* is often the only search which is necessary.

Satisfaction of
lis pendens.

Until recently the only mode of discharging the registry of a *lis pendens* was by obtaining an order in the cause upon a petition as of course presented at the Rolls; and on this being filed with the senior Master of the Common Pleas, satisfaction was entered in the register (b); but now, as in the case of registered judgments, the 23 & 24 Vict. c. 115, empowers the senior Master to enter satisfaction as to any registered pending suit, or *lis pendens*, upon the filing of an acknowledgment by the plaintiff in the form, or to the effect therein mentioned (c).

Vacating the
registration of
a *lis pendens*.

And now, where the litigation is determined, or is not being *bond fide* prosecuted, the Court may make a summary order vacating the registration of the *lis pendens*, without the consent of the party who registered it; and, on an office copy of such order being filed, the senior Master is to enter a discharge of the *lis pendens* on the register (d).

Special case in
a *lis pendens*.

We may remark here, that a special case, filed under the 13 & 14 Vict. c. 35, is a *lis pendens* (sect. 17): so also is the duplicate of an administration summons filed under the 15 & 16 Vict. c. 86 (sect. 46): so also is an administration

(a) And see 18 & 19 Vict. c. 15, 366.

n. 2.

(b) *Peck. Pr.* 117; *Dan. Ch. Pr.*

(c) Sect. 2.

(d) 30 & 31 Vict. c. 47, s. 2.

suit, as respects estates sold under the decree (e): and filing, and not service, of the bill, is the commencement of a *lis pendens* (f). If a bill is amended, the suit is pendent as to any fresh matter introduced into it, only as from the time of amendment.

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By the 114th section of the 25 & 26 Vict. c. 89, any petition for winding up a company under the Act was, if duly registered, made a *lis pendens* under the 2 & 3 Vict. c. 11. It was a common practice in winding up cases to register the petition for the purpose of affecting the estate of the individual contributory, although, at the date of registration, there might be no specific charge against it. But the Court of Appeal, reversing a decision of the Master of the Rolls, held that the section only authorized registration as against the company (g); and now the section is repealed (h).

Winding up
petitions.

When the property is copyhold, the Court Rolls should be searched for documents, incumbrances, &c., not appearing on the abstract; so, where the property lies in a district subject to the Register Acts, viz., Middlesex, Yorkshire, Kingston-upon-Hull, and the Bedford Level, searches should be made in the local registers: these searches, both in the Court Rolls and in the county register, should be extended over the whole period covered by the abstract: copyholds, however, are excepted out of the Register Acts of Yorkshire, Middlesex, and Kingston-upon-Hull: so also are leases at rack-rent, and leases for a term not exceeding twenty-one years, where the actual possession and occupation go along with the lease; but, in practice, when such leases are assigned by way of mortgage, it is usual to require them to be registered. It is considered doubtful whether the exception as to copyholds extends to leases of copyhold estates (i). In practice such leases are frequently registered, where the land is let for building purposes (k).

Court Rolls
and local registers.

(e) *Drew v. Earl of Norbury*, 3 J. & L. 267; see as respects chattels, *Berry v. Gibbons*, L. R. 8 Ch. Ap. 747.

(f) *Drew v. Earl of Norbury*, *ubi suprd.* And see below, Chap. XV.,

s. 5, as to *lis pendens* being notice.

(g) *Ex parte Thornton*, L. R. 2 Ch. Ap. 171.

(h) See 30 & 31 Vict. c. 47, s. 1.

(i) Sugd. 732.

(k) Scriv. on Cop., 5th Ed., p. 333.

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Local registries need not be searched where land registered under 25 & 26 Vict. c. 53. Bankruptcy.

Where land situate in the counties of York or Middlesex has been put upon the register under the provisions of the 23 & 26 Vict. c. 53, *and while it remains thereon*, the local registries are to cease to be applicable (l).

In many cases the situation in life of the parties may render it proper to search the Court of Bankruptcy (m). Purchasers without notice were protected by the 2 & 3 Vict. c. 11, s. 12, and 2 & 3 Vict. c. 29, against acts of bankruptcy, upon which no fiat had actually issued; the provisions of these statutes were repealed, but were, in effect, re-enacted by the Bankruptcy Consolidation Act of 1849 (n); and were not repealed by the Act of 1861. Under the Bankruptcy Act of 1869, any disposition or contract with respect to the disposition of property by conveyance or otherwise made by any bankrupt *bond fide* and for value with any person not having at the time notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication is to be valid notwithstanding prior acts of bankruptcy (o). The search should, in strictness, be for twenty years, but a five years' search is commonly deemed sufficient.

Notice of—
when immaterial.

Notice of an act of bankruptcy was under the Act of 1849 immaterial if twelve months had elapsed without a fiat or a petition for adjudication having been sued out or filed (p); and this provision was not repealed by the Act of 1861. By the Act of 1869 the period for presenting a petition is limited to six months from the date of the act of bankruptcy (q). The search, when made, should extend to deeds of assignment, composition, or inspectorship, registered under the provisions of the Act of 1861.

Annuities.

By the 17 & 18 Vict. c. 90, which abolished the laws against usury, the Act requiring the enrolment of grants of

(l) See sect. 104.

(m) *Cooper v. Stephenson*, 16 Jur. 424; 31 L. J. Q. B. 292.

(n) 12 & 13 Vict. c. 106, s. 133.

(o) 32 & 33 Vict. c. 71, s. 95.

(p) 12 & 13 Vict. s. 53, 134, which sections were not repealed by the 24 & 25 Vict. c. 134.

(q) 32 & 33 Vict. c. 71, s. 6.

life annuities was repealed; but the 18 & 19 Vict. c. 15, s. 12, established a new register of life annuities and rent-charges not created by will or marriage settlement (*r*). It is conceived that the enactment would not be held to apply in the case of a rent-charge for life reserved to a vendor as the consideration, or as part of the consideration, for the sale of property. The recent statutory provisions as to judgments and Crown debts do not extend to annuities.

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Where the estate has been entailed, or has belonged to married women, it may be proper, in special cases, to search for inrolled deeds and acknowledgments under the 3 & 4 Will. IV. c. 74; but such a search, it is conceived, is not usual in practice, unless there be reason to suspect the existence of suppressed documents.

Recovery
deeds and
acknowledg-
ments by
married
women

In some cases it may be proper to search at the office of Land Registry for rent charges created in respect of loans under the Land Improvement Acts (*s*).

Land drainage
loans.

(3.) *Time for making searches and inquiries.*

Section 3.

Whatever searches and inquiries are deemed necessary, should, of course, be brought down to a point as close as possible to the time fixed for completion: some practitioners make the search immediately after obtaining an opinion upon the abstract, and a supplemental search immediately before completion; but the more ordinary course, it is conceived, is to make but one search, and that immediately before completion.

Time for
making
searches and
inquiries.
Searches, &c.,
when to be
made.

A solicitor will not be allowed upon taxation, even as between solicitor and client, the costs of searches directed by counsel, but which have, to the knowledge of the solicitor, been rendered unnecessary by subsequent events (*t*).

Unnecessary
costs of, not
allowed.

(*r*) The place of search is the same as for judgments.

Debenture Act, 1856, 28 & 29 Vict. c. 78.

(*s*) See 27 & 28 Vict. c. 114, and the former Acts there cited; 33 & 34 Vict. c. 56; see also the Mortgage

(*t*) *Langford v. Mahoney*, 3 J. & L. 97.

CHAPTER XII.

AS TO THE PREPARATION OF THE CONVEYANCE

1. *General matters relating to, and to the form of.*
2. *As to the parties.*
3. *The recitals.*
4. *The consideration—words of conveyance—and parcels.*
5. *The covenants.*
6. *The draft and engrossment.*

Section 1.

General matters relating to, and to the form of.

Purchaser prepares conveyance.

(1). UPON a sale in consideration of a gross sum, the purchaser, having accepted the title, is bound, subject to any special stipulation in the contract, to prepare the conveyance, and tender it for execution to the vendor (*a*); and reason seems to favour the same rule even where the consideration is a rent-charge, although the practice in such cases appears to be unsettled (*b*). In some provincial districts it seems to be the practice to stipulate that the conveyance shall be prepared by the vendor's solicitor at the expense of the purchaser. Such a stipulation would no doubt be regarded with disfavour by the Courts. It is, however, not unusual, and is often a matter of general convenience, upon a sale of property in many small lots, for building or other similar purposes, to have a model form of conveyance prepared, and to offer it to purchasers at a moderate specified charge.

Custom, that steward prepares surrenders.

A custom in a manor, that the steward shall prepare all surrenders for a reasonable fee, appears to be valid (*c*).

(a) *Sag.* 240, 241.

(b) 8 *Term. Contr.* by S. 518.

(c) *Red v. Aggs.* 2 B. & Ald. 550;

Reg. v. Bishop's Stoke (Lord of Manor of), 8 Dowl. P. C. 608.

In the absence of special custom, the lord is not bound to admit to several tenements by one admittance. When the admittances are several there must be several stamps and fees to the lord: but the steward cannot, in the absence of special custom, claim several fees, as such; but merely a *quantum meruit*: and the amount of the fees claimed by him as customary may itself show that they could not have been payable from the commencement of legal memory (*d*). For the purpose of the above rules, fractional shares in a single tenement, held by tenants in common, constitute separate tenements so long as they are separate; but not after they are re-united on the Court Rolls (*e*).

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As to surrenders, &c., in case of several tenements.

Even if a contract for purchase of an equitable interest can in itself amount to a conveyance (*f*), the purchaser is entitled to a formal assurance, if such appear by the contract to be necessary, in order to carry the intention of the parties into effect (*g*).

Conveyance of equitable interest.

As we have already seen (*h*), the preparation of the conveyance is not, necessarily, a waiver of objections to or requisitions upon the title, though, as a general rule, it ought not to be prepared, until it is reasonably certain that the title will be accepted; and the draft, if submitted for approval on the vendor's behalf, should be sent expressly without prejudice to any pending requisitions on the title.

Preparation of conveyance no acceptance of title.

It has been held, that a purchaser cannot compel the vendor to get in an outstanding equitable interest by a deed distinct from the general conveyance (*i*). It is, however, conceived, that this doctrine must be applied with hesitation (*k*); and that, subject to the question of expense (*l*), a purchaser may generally object to have his conveyance in-

Whether purchaser can require outstanding interests and incumbrances to be got in by separate deed.

(*d*) *Treherne v. Gardner*, 26 L. T. 271, Q. B.; 7 Jur. N. S. 394.

C. C. 159.

(*h*) *Supra*, p. 432.

(*e*) *Queen v. Eton College*, 9 Ad. & Ell. N. S. 526, and cases cited.

(*i*) *Reeves v. Gill*, 1 Beav. 375.

(*k*) Sug. 558.

(*f*) But see as to this, *supra*, p. 246.

(*l*) As to which, *vide infra*, Ch.

(*g*) *Fenner v. Hepburn*, 2 Y. & C.

XIII.

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May require
 confirmation
 of doubtful
 title by
 separate deed,
semble.

cumbered with matter arising from the complicated state of the title (*m*): indeed it may often, especially when the property is likely to be much subdivided, be most desirable to avoid any reference upon the conveyance to a voluminous, although apparently satisfactory, earlier title. And it is conceived that (subject to the question of expense,) a purchaser may insist on taking his conveyance in the form most convenient to himself, provided that the vendor is not thereby prejudiced (*n*); and on keeping off the face of his conveyance any matter which, although agreed to be waived as an objection, yet tends to throw a doubt upon the title, or any collateral matter which may hereafter embarrass the proof of the title (*o*). If, for instance, trustees were to sell under circumstances not necessarily appearing upon the face of the conveyance, but amounting to a breach of trust, and the *cestuis que trust* agreed to confirm the sale, the purchaser might, it is conceived, insist upon taking this confirmation by a separate deed; for to include it in the conveyance would oblige him, upon a resale, to prove who were the parties beneficially interested, and might give rise to questions which would have been wholly immaterial to a sub-purchaser without notice of the breach of trust.

All unneces-
 sary matters
 and parties to
 be kept off
 conveyance &

It may, in fact, be laid down as a general rule in preparing conveyances, that not only should all objectionable or doubtful matter be kept off the title, but that nothing should be brought on to it, the introduction of which is not evidently necessary or expedient: in proportion as additional matter is introduced into a deed, and additional persons are made parties to it, the chances of some error or ambiguity existing in it are increased.

Purchaser's
 right to sepa-
 rate convey-
 ances.

And when the nature of the title to the property renders it desirable so to do, as on a purchase of undivided parts of

(*m*) See *Jones v. Lewis*, 11 Jur. 685.
 511; and 1 De G. & S. 215; stated *
 infra.

(*o*) See *Oliver v. May*, 16 Beav.
 278.

(*n*) *Cooper v. Cartwright*, Johns.

a freehold estate and of the entirety of a judgment debt (p), the purchaser may insist upon taking separate conveyances, and upon apportioning the purchase-money as he thinks fit: but this doctrine must, of course, be confined within reasonable limits; for a vendor of a compact estate, held under one title, could hardly be required to convey it in lots, by several assurances, merely to suit the convenience of the purchaser; at any rate not without being paid all additional costs thereby incurred: and it is obvious that the excessive multiplication of conveyances might, apart from the question of costs, be reasonably objected to by a vendor. The proper rule would seem to be, that the purchaser's right to separate conveyances depends not upon the question of convenience, considered merely with reference to his own private views in respect to future dealings with the estate, but upon his being able to show that such a mode of carrying out the contract is that which, in the absence of any special instructions, would probably be recommended by experienced conveyancers.

Upon the purchase of a property in mortgage, the purchaser should pay off the charges, and take a clear conveyance of the legal and equitable estates from the vendor and his mortgagees; and then, if such be the arrangement, execute fresh securities to the latter for the amount which is to remain upon the property. By taking a mere conveyance of the equity of redemption he becomes liable to be compelled to redeem, not only the mortgage upon the particular property, but all other subsisting mortgages of other properties by the same mortgagor which, either before or after his own purchase, become united in the same mortgagee; and this although he bought in ignorance of their existence (q).

Precautions to be observed on purchase of estate in mortgage.

(p) *Clarke v. May*, 16 Beav. 273.

(q) *Becror v. Luck*, 4 Eq. 537; *Lovell v. Chapman*, V.-C. Hall, 15 March 1875; the same principle applies in the case of a mortgage of an equity of redemption; *Becror v. Luck*, *ubi*

suprà. The 7th section of the 37 & 38 Vict. c. 78, does not affect the equitable right of a mortgagee to consult with his mortgagor from the same mortgagor. This section, it is understood, is about to be repealed.

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His right to keep mortgage debt on foot.

Under a contract for the purchase from a mortgagor of his mortgaged estate, free from incumbrances, the purchaser, with the concurrence of the mortgagee, may so take his conveyance as to keep the mortgage on foot; but he must procure his vendor to be discharged from all liability, and pay any extra expense which may be occasioned by taking the conveyance in that form (r).

Disentailing assurance.

So, a purchaser from a tenant in tail, may, it is submitted, insist upon the property being disentailed at his own expense by a separate deed; and may reasonably object to any unnecessary exposure of his title in a public office.

Statutory forms of railway conveyances.

The Lands Clauses Consolidation Act, 1845, and the earlier railway and other similar Acts, contain statutory forms of conveyance to the several companies; the use of these forms, in preference to the ordinary instruments of assurance, is not obligatory: but inasmuch as an extraordinary efficacy (s) is given to conveyances made according to the statutory form, *or as near thereto as the circumstances of the case will admit*, it seems to be desirable to frame the assurances as much upon the model of the statutory form as may conveniently be; in one case, where the deed was not in the statutory form, it was held that the company were not bound to register it under the provisions of their Act (t).

Short parliamentary forms of 1845.

Certain short forms authorized by Acts passed in the Session of 1845 have, by the universal consent of the profession, been consigned to a deserved oblivion (u). Such enactments are either unnecessary or mischievous;—unnecessary, if the parliamentary form would, if unauthorized by Parliament, merely express in fewer words the meaning of the forms in ordinary use: and mischievous, if an unnatural and secondary meaning is given by Statute to words which

(r) *Cooper v. Cartwright, Johns.* N.B. 972. See 2 & 3 Will. IV. c. 110, s. 90.

(s) See 8 & 9 Vict. c. 18, s. 81.

(u) See 8 & 9 Vict. c. 119; and, *As to Leases*, c. 124.

(t) *Re General Cemetery Co.*, 2 Jur.

are *prima facie* clear and intelligible; for the effect is to induce not merely uncertainty, but positive misconception, in the mind of the unprofessional reader. For instance, a lessee who has, in the usual way, covenanted not "to carry on any trade or business" upon the demised premises, may feel a reasonable and saving doubt whether he is safe in using them for a school (*x*): but, unless more addicted than is customary to the perusal of Acts of Parliament, he probably will scarcely suspect that such an occupation is forbidden by an engagement, not to "use premises as a shop;" which is, nevertheless, the statutory equivalent to the ordinary covenant (*y*). If brevity be the only or the predominant desideratum in a legal document, it would be quite possible, with the aid of the Legislature, to express the greater part of an ordinary assurance, algebraically; which would at least have this advantage, *viz.*, that a person who had entered into covenants $x + y + z$, would hardly venture to act upon his own ideas as to the unknown value and signification of these mysterious letters, without consulting the interpretation clause of the Statute to which they owed their legal efficacy.

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Upon a sale in many lots of an estate subject to an incumbrance which is to be paid off out of the purchase-money, expense may be saved by taking a release to the vendor, instead of making the incumbrancer concur in the several conveyances: and this, when the parties are on good terms, is usually acceded to; although it might probably be resisted, either by a purchaser, or by the incumbrancer.

Incumbrances upon sale in lots to be got in by separate deed.

Where, as is often desirable, a subsisting incumbrance is to be kept on foot for the purchaser, the more prudent course appears to be not to rely on a mere declaration of intention, but to let the sum itself, and also the term of

Incumbrances, how to be kept on foot for purchaser's benefit.

(*x*) See *Doc d. Bish v. Keeling*, 1 M. & S. 95; *Kemp v. Sober*, 1 Slim. N. S. 517; *Wickenden v. Webster*, 2 Jur. N. S. 590; 5 E. & B. 387; *Johnston v. Hall* 9 Jur. N. S. 780: 2 K. & Jo. 414; *Wilkinson v. Rogers*, 2 De G. J. & S. 82.
(*y*) See 2nd schedule to 8 & 9 Vict. c. 124.

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years, if there be one for securing it, be assigned to a trustee for the purchaser: or to let a declaration of trust be executed by the incumbrancer (z), and the legal owner of the term. But an express declaration that the incumbrance is to be kept on foot will, of itself, prevent a merger (u).

As to
restrictive
exceptions,

When land is sold subject to restrictive covenants as to user, to be created *de novo*, it is desirable to except from the granting part of the conveyance all rights, privileges, and easements, the enjoyment of which would be inconsistent with, or a breach of, the subsequent restrictive covenants. And in such a case, as also when rights, privileges, or easements are under the agreement to be made the subject of express reservation or exception, it is desirable to state in the declaration of uses that the property shall remain to such uses as shall give full effect to the subsequently contained exceptions and reservations, and (subject thereto) to the uses subsequently declared. An actual re-grant is sometimes resorted to; but this may give rise to difficulty, or at any rate additional expense, if the estate is to be conveyed to uses in settlement; and the plan above suggested seems to be equally efficacious.

Separate deeds
for separate
matters, &c.

And it may be remarked, that it is generally inexpedient, and, eventually, false economy, to comprise several distinct estates or matters in a single deed.

Act for merger
of satisfied
terms.

As a general rule, the assignment of satisfied terms is rendered unnecessary or impracticable by the Act of 8 & 9 Vict. c. 112: the Act, however, does not appear to extend to copyholds, customary freeholds (b), or leaseholds (c); and it seems doubtful whether either the 1st or 2nd section extends

(z) See *Medley v. Horton*, 14 Sim. 226, 229; *Watts v. Symes*, 16 Sim. 640; but see *S. C.*, 1 De G. M. & G. 240. See, on the same subject, *Croft v. Bishopsgate*, 3rd ed. 304; 9 Jarm. Conv. by S. 213, 214; *Walcott v. Condor*, 5 Ir. Jur. 49.

(u) *Jameson v. Stein*, 21 Beav. 5, 13.

(b) See *Day. Concise Conv. Proc.*, 3rd ed. 79.

(c) That is, where a term is created by sub-demise: see and consider sect. 8 of Act.

to any hereditaments other than "land" technically so called (d). But a purchaser is entitled to have an outstanding unsatisfied term assigned or surrendered, even where by a decree of the Court, provision has been made for satisfying it (e).

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Where, before the passing of the Act, A., who although *Doe v. Price.* not in fact, yet believed himself to be, the owner of a freehold estate, mortgaged it to B., and an old term for years was at the same time assigned to a trustee, in trust for B. and to attend the inheritance, it was held that this term could not, after the 31st December, 1845, be used in ejectment on behalf of a person claiming the estate by a title paramount to that of A.; although it might, if requisite, have been used as a defence by a party claiming under B. (f).

And it seems probable that a satisfied term, which retains *Protection of a satisfied term under the statute.* a *quasi* existence under the Statute, does by no means universally afford to a purchaser the same protection which it would have afforded to him under the old practice. If he be in actual possession of the property, it may enable him to resist the attack of an adversary; but, if he be dispossessed, it apparently gives him no facility for recovering possession: considered as a legal weapon, it is, in fact, a mere shield, and not a sword.

In one case, where, before the passing of the Act, a term *Doe v. Jones.* was declared to be held in trust for securing a mortgage debt, (part of which was money for securing which the term had been originally created, and the entirety of which was secured by, as was supposed, a mortgage of the reversion in fee,) and subject thereto in trust for A. and B., who were supposed to be entitled to the equity of redemption in fee, but the reversion in fee, expectant on the term, was in fact

(d) *Dav. C. C. P.* 75, 79.

(e) *Stronge v. Hawkes*, 2 Jur. N. S. 338.

(f) *Doe v. Price*, 16 M. & W. 603;

and see *Doe v. Mouldale*, *ibid.* 689, and *Price v. Hesse*, 4 De G. M. & G. 495.

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vested in X. under a prior concealed conveyance, and in 1847 A. paid off the mortgage, and subsequently brought an ejectment against X. on the demise of the trustee of the term; the Court of Queen's Bench intimated a doubt whether the payment of the sum due on the original security, by a person supposed to be, but who was not in fact, the owner of the equity of redemption, rendered the term a satisfied term within the 2nd section of the Act (*g*); and held that, at any rate, the term had not become attendant on the inheritance, either by express declaration—there having been no such declaration—or by construction of Law,—for the trust was expressly declared to be for A. and B., who had not the inheritance, although they were supposed to be entitled thereto when the declaration of trust was executed,—and that the term was therefore still in existence (*h*). This decision, and the accompanying dictum, which, if correct, would materially restrict the operation of the 1st section, and go far to reduce the 2nd section of the Act to a dead letter, are not understood to have met with general approbation (*i*), or to have materially affected the practice of conveyancers.

*Cottrell v.
Hughes.*

In a case at Law, where a party for whose benefit a term had been assigned before the passing of the 8 & 9 Vict. claimed the protection of the term under that Act, the Court held that the proper way of testing his right to such protection was to consider whether, if that Act had not been passed, Equity would restrain him from setting up the term (*k*); and where a satisfied term was assigned before the passing of the Act as a security for money advanced to a tenant for life, under a settlement of the fee, and to attend the inheritance, the Court of Exchequer held, following the authority of *Cottrell v. Hughes*, that the term could not be set up against the parties entitled in remainder, the

(*g*) "The term clearly was a satisfied one." Sug. on Stat. 292.

774.

(*i*) See Sug. Stat. 294.

(*k*) *Doe d. Clay v. Jones*, 13 Q. B.

(*k*) *Cottrell v. Hughes*, 15 C. B. 532.

mortgagee having had clear notice of the settlement (*l*). Where, before the passing of the Act, a mortgagee in fee, on advancing his money, stipulated for an assignment of an outstanding satisfied term held in trust for the mortgagor, and this was agreed to, but no assignment was executed prior to the passing of the Act, it was held that as the term, although satisfied, was not simply attendant, it remained unmerged by the Act (*m*). Of course, the same result would follow in those frequent cases where the term has been actually assigned in trust for the mortgagee, his executors, administrators, and assigns, and subject thereto, in trust to attend the inheritance. In such cases, the Act would not operate until the satisfied term had also become simply attendant, by the performance of the secondary trusts to which it was subjected, prior to the passing of the Statute. If, however, as is sometimes found to be the case in titles, the term was assigned simply for the mortgagor, his *heirs and assigns*, and to attend the inheritance, and was so held when the Act came into operation, the term, it is conceived, would probably be held to have merged.

Upon a sale of copyholds, it has been a frequent practice, with a view to saving or postponing payment of the fine on alienation, and the expenses of admission (*n*), to take the surrender to the use of the purchaser's appointment, and in default of appointment, to the use of himself in fee: but this, as it leaves the vendor liable as tenant, ought to be resisted by him if the incidents of tenancy are onerous. And it has been held that the lord of a manor need not, in the absence of special custom, accept a surrender so framed (*o*); although if he accept, he must subsequently act upon it (*p*); and a copyholder has universally the right

As to surrendering copyholds to uses.

(*l*) *Plant v. Taylor*, 8 Jur. N. S. 140; 7 H. & N. 211.

(*m*) *Shaw v. Johnson*, 1 Dr. & Sm. 412.

(*n*) *Rex v. Oundle*, 1 Ad. & E. 283.

(*o*) *Flack v. Downing College*, 13 C. B. 945; see *Glass v. Richardson*, 2

De G. M. & G. 658; 9 Ha. 698; and see *Reg. v. Garland*, L. R. 5 Q. B. 269; *Garland v. Mead*, L. R. 6 Q. B. 441.

(*p*) *Eddleston v. Collins*, 3 De G. M. & G. 1.

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to surrender to the use of his will (g): and may, therefore, now that a surrender to the use of a will is unnecessary, devise his copyhold hereditaments so as to create a valid power of appointment.

(2) *As to the parties.*

Section 2

As to the
parties.
Who to be
parties.

All persons whose concurrence is necessary in order to give to the purchaser the full benefit of the contract, must, of course, be parties to and execute the conveyance: and it is often desirable that persons from whom nothing moves by the deed should be parties to it, for the purpose of affecting them with notice of its contents, and preserving indisputable evidence of the fact of notice

Judgment
creditors,
when.

Previously to the 27 & 28 Vict c 112, by which, as we have seen (i), a judgment does not affect land until it has been actually delivered in execution, if the title were such that judgment creditors could at Law take the property in execution, this alone entitled the purchaser to require their concurrence; even though Equity might by injunction have restrained the exercise of their legal right (n); so, also, where the judgments were a charge upon a mere equitable ownership, the purchaser might, in certain cases, be entitled to require the concurrence of the judgment creditors. Thus, where A. agreed to sell to B, who accepted the title, paid part of the purchase-money, and was let into possession, but took no conveyance, and A. in a suit against B, to establish his lien, obtained a decree for sale, a purchaser, under this decree, objected to complete without the concurrence of the judgment creditors of B, whose judgments were prior to the decree, but who were not parties to the suit; and the objection was held to be valid (f). Under the present

(g) *Flaxley, Downing College, supra.*

(h) *Steed, Ch. XII., sect. 2.*

(i) *Craddock v. Piper*, 14 Sim. 310.

(j) *Governors of Grey-Coat Hospital v. Westminster Improvement Commissioners*, 1 De G. & Jo. 551.

Law, it is conceived that unless there has been actual delivery in execution at Law, or what is tantamount to it in Equity, viz., a decree or order of the Court establishing the lien (*u*), in either of which cases the concurrence of the judgment creditor is clearly necessary, the purchaser cannot require him to be a party to the conveyance merely because he has an inchoate right, which, if enforced, might ripen into a charge (*v*); but the purchaser should not part absolutely with his purchase-money until satisfied that such inchoate right has not ripened into a charge.

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In the case of a resale before completion, where the conveyance is made direct to the sub-purchaser (B.) and there is no increase of price, it seems to be better not to make the original purchaser (A.) a party to the conveyance, but to let him sign a memorandum authorizing the vendors to convey to B. in substitution for himself: a duplicate of such memorandum should be given to B. The practical objection to making A. a party seems to be this, viz., that if he has in any way dealt with or incumbered his interest under the agreement; and the fact, although unknown to B., were to come to the knowledge of any future purchaser or mortgagee (C.), there would be a difficulty in making out a marketable title; for although B., taking the legal estate without notice of such dealing or incumbrance, would acquire an indefeasible title (*x*), which he could transmit to C. although affected with notice, yet it might be impossible to adduce evidence which would be satisfactory to C., of the fact of the want of notice on the part of B. (*y*).

Whether first purchaser should be party to conveyance direct to sub-purchaser.

And where it is a term of the contract that certain specified persons shall concur, the vendor cannot decline to procure

Stipulation that unnecessary parties shall concur, is binding.

(u) *Supra*, Ch. XI., sect. 2.

(v) See *Eart of Cork v. Russell*, L. R. 13 Eq. 210; and compare *Mildred v. Austin*, L. R. 8 Eq. 220.

(x) It is conceived that the 7th section of the 37 & 38 Vict. c. 78, has

not deprived B. of the protection afforded by the legal estate, and *quære*. This section, it is understood, is about to be repealed.

(y) See *Freer v. Huse*, 4 De G. M. & G. 495.

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their concurrence on the ground that they are in fact unnecessary parties (z): but it would appear that he cannot be required to procure the concurrence of unnecessary parties, upon the mere ground that he has it in his power so to do (a).

Vendor must
 in absence of
 stipulation,
 procure con-
 currence of
 necessary
 parties.

But the vendor will be compelled, even in the absence of express stipulation, to procure the concurrence of parties who are bound to convey at his request (b), e.g., trustees of the legal estate (c); and in one case a purchaser of copyholds, who had acquired the whole legal and beneficial interest, was nevertheless held entitled, in a suit against his vendor, to require the concurrence of mere nominal trustees who had never been admitted under a voluntary covenant to surrender (d). Of course, a vesting order would be equivalent to a conveyance. A direction in a decree for specific performance that the vendor shall convey has the same effect as a direction that the vendor "and all other necessary parties" shall convey (e).

Sale by mort-
 gagee, under
 power of mort-
 gageor's con-
 currence, not
 necessary.

Upon a sale by a mortgagee under a valid power of sale duly exercised, the purchaser cannot require the concurrence of the mortgagor (f); although by the mortgage deed the latter agreed to join in any sale, if required (g).

Mortgagor
 selling free
 from incum-
 brances must
 procure con-
 currence of
 mortgagee.

A mortgagor, selling as an unincumbered owner, must, of course, procure the concurrence of his mortgagee (h): so, a tenant in tail in remainder will be decreed to convey a base fee, and to covenant to bar the remainders over upon becoming tenant in tail in possession (i).

(z) *Benson v. Lamb*, 9 Beav. 502.

(a) See *Corder v. Morgan*, 18 Ves. 344.

(b) See 1 Madd. 11; *Costigan v. Hunter*, 2 Sch. & L. 160, 166.

(c) See now as to a bare trustee 37 & 38 Vict. sect. 5 & 6; and as to what is a bare trustee within the Act, *infra*.

(d) *Slade v. Waller*, 28 Beav. 486; but no affidavits given; *sed quere*.

(e) *Menton v. Kirwood*, L. R. 3 Ch.

Ap. 614; affirming *V.-C. S.*, L. R. 1 Eq. 449.

(f) *Clay v. Sharpe*, Sug. 396; *Allen v. Martin*, 5 Jur. 229, R.

(g) *Corder v. Morgan*, 18 Ves. 344.

(h) As to the power of the legal personal representative of a mortgagee to convey the mortgaged estate, see 37 & 38 Vict. c. 78 sect. 4, and *vide supra*, pp. 15, 16.

(i) *Lord Bollingbroke's case*, 1 Sch. & L. 19, n.

Upon the sale of a bankrupt's estate, he is usually made to convey and covenant for title (*k*): his covenants, however, are obviously of little value; and it would seem that he cannot be compelled to execute the conveyance (*l*): but the Court of Bankruptcy was by the Act of 1840 empowered (*m*), upon the application of the assignees, or of the purchaser, if the bankrupt did not try the validity of the adjudication, or if there had been a verdict at Law establishing its validity, to order the bankrupt to join in the conveyance: and if he did not execute it within the time directed by the order, then he, and all persons claiming under him, were to be estopped from objecting to such conveyance; and all estate, right, or title, which he had in the property, was to be as effectually barred as if such conveyance had been actually executed by him (*n*). The order would appear to have been of course if he did not dispute the validity of the adjudication (*o*). It was doubtful whether a purchaser could, in ordinary cases, require the assignees to procure such an order unless he could throw a doubt upon the validity of the adjudication: if he himself applied for it, the costs would seem to have been in the discretion of the Court (*p*).

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Bankrupt,
when to be a
party.

Under the Act of 1869, the bankrupt is to execute all such conveyances, deeds and instruments, and generally to do all such acts and things in relation to his property, and the distribution of the proceeds among his creditors, as may reasonably be required by the trustee, or may be prescribed by rules of Court, or be directed by special order of the Court upon the application of the trustee or any creditor (*q*).

Under the
Act of 1869.

As respects dower, in cases falling under the new law,

Dowress,
when to be a
party.

(*k*) Sug. 575.

(*l*) Dav. Conv. 2, Part I., p. 457.

(*m*) See 12 & 13 Vict. c. 106, s. 148, and 6 Geo. IV. c. 16, s. 78; and see Rule 17 of the General Orders under the Act of 1861.

(*n*) See *Ex parte Jackson*, 2 Dec. & C. 458; *Ex parte Thomas*, 2 Gl. & J.

278; *Ex parte Bradstock*, 1 M. D. & De G. 118.

(*o*) *Ex parte Bradstock*, 1 Mon. D. & De G. 118.

(*p*) See note to 9 Jarm. Conv. by S. 261.

(*q*) 32 & 33 Vict. c. 71, s. 19.

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Assignment of
term, whether
purchaser
must rely on,
as a bar.

the concurrence of the wife is, of course, unnecessary; the conveyance by the husband alone being a sufficient bar. In cases falling under the old law, it has been held that the purchaser could not insist on the wife's concurrence if he could obtain an assignment of a legal term for years created previously to the right of dower attaching upon the estate, and of sufficient duration (r); inasmuch as, if the wife proceeded for her dower at Law, she could recover it only with a *cesset executio* during the term, and Equity would not remove the bar. This, however, does not seem to be a satisfactory reason for the doctrine; as not only was the purchaser obliged to incur the expense of keeping the term on foot, but he would have had to pay at least his own costs at Law in the event of the dowress availing herself of her legal remedy (s): and it would appear that a purchaser can at any rate require the vendor to ascertain, if practicable, whether or no a liability to dower exists; and is not bound to be satisfied with a reply that if such liability exist he may protect himself by means of a term (t). It was decided by V.-C. K. Bruce, that an old term for years which upon a purchase prior to the 1st January, 1846, (when the 8 & 9 Vict. c. 112 (u) came into operation,) was duly assigned to a trustee for the purchaser, is a sufficient protection to a sub-purchaser, purchasing on or after the 1st January, 1846, against the dower of the wife of the original vendor (x): but such a term, it is conceived, would be no protection to the sub-purchaser against any claim to dower by the wife of such first purchaser; supposing him to have been seised in fee on the 1st January, 1846. Where a legal jointure under the 27 Hen. VIII. c. 10 is relied on in bar of dower, the vendor must produce a satisfactory title to the jointure land (y): but where the purchaser has agreed to rely upon

(r) See, 623; *Mole v. Smith*, Jac. 426; *Maundrell v. Maundrell*, 7 Ves. 547, 16 V. 343.

(s) See also Jarman's note, 1 Jarin. Com. 2, 238.

(t) *Miles v. Ward*, 12 Jur. 475, 10 C. 57.

(u) Rendering the assignment of satisfied terms unnecessary.

(x) See *v. Widdow*, 12 Jur. 347.

(y) See, however, *Widdow v. Widdow*, 12 Ves. 347.

the equitable bar created by an equitable jointure, it need only be shown that the husband or other contracting party has performed that which the intended wife (being an adult) agreed to accept in lieu of dower (z).

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The liability to dower has been held a fit subject for compensation, where a wife, entitled to dower, refused to concur in her husband's conveyance, and the purchaser was willing to take the estate (a): but a purchaser, it is conceived, would not be compelled to accept compensation; the claim of the widow being not to a mere money payment, but extending, if she so elects, to the actual possession of so much of the land as may be set out in satisfaction of her dower. Her claim, too, it must be remembered, in the case of sales by her husband without her concurrence, is a separate claim against each distinct purchaser, and extends to buildings or other improvements: and in the case of house property, the widow of a copyholder has, by special custom, been held entitled as against a purchaser to a separate third of each tenement (b).

As to concurrence of dower trustee.

When the property stands limited to the common uses to bar dower in favour of the vendor, he should either exercise his power of appointment, or the dower trustee should concur in the conveyance. The omission to procure his concurrence (the appointment being omitted for the sake of conciseness) is, however, not very infrequent in practice, and sometimes gives rise to a vexatious requisition on the part of a sub-purchaser, to get in the outstanding fraction of a legal estate. Where the limitations to bar dower are preceded by the usual power of appointment, the operative

Dower may be subject for compensation.

(z) See *Dyke v. Randall*, 2 De G. M. & G. 209.

(a) *Wilson v. Williams*, 3 Jun. N. S. 810; but see and compare *Bainbridge v. Kinsard*, 52 Beav. 346, where the property formed part of a large estate subject to a charge for portions, and the purchaser claiming specific performance was held to be not entitled either to indemnity or compensation.

(b) *Doov. Chinnell*, 1 Ad. & Ell. N. S. 682; see *Thompson v. Burva*, L. R. 16 Eq. 592. By the 23 & 24 Vict. c. 126, sect. 26, ordinary writs of summons from the Court of Common Pleas are substituted for writs of right of dower and writs of dower *unde nihil habet*: but the more convenient remedy is in Equity.

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words "grant and convey" would probably be held to be a sufficient exercise of the power; and in one case, where there was no prior power of appointment, and the purchaser insisted on the dower trustee joining in the conveyance, the Court held that the objection, though frivolous, was well founded, but gave no costs to either party; and on appeal this decision was affirmed (*c*).

Wife of trustee or mortgagee not required to concur.

We may remark that the legal right of the wife of a trustee or mortgagee in fee to dower, as its attempted enforcement would be at once restrained in Equity (*d*), is never made a ground for her concurring in the conveyance, and there can be no doubt that such a requisition would not be countenanced by the Court.

Dower Act—
—what it extends to.

We may also remark that the Dower Act extends to gavelkind lands (*e*); but not to copyholds, or customary freeholds (*f*); so that on a sale of copyholds, or customary freeholds, held of a manor in which the custom is that the widow shall claim her freebench of all lands of which her husband was seised during the coverture, the wife must concur. Even where such a custom exists, it is conceived that the wife's inchoate or potential claim is destroyed by an enfranchisement by the husband, even although effected without her concurrence; but in such a case the safer practice is to require her concurrence.

As to the husband's concurrence in cases of separate estate;

Where a married woman concurs in respect of her separate estate, or as donee of a power exercisable by her as if she were a *feme sole*, or for the purpose of giving her separate consent to the exercise of a power, it is usual to name her as a party apart from her husband; and in all such cases his concurrence may be safely dispensed with; although, in the

(*c*) *Collard v. Roe*, 4 De G. & Jo. 528.

(*d*) *Neel v. Jeron*, Freem. C. C. 43;
Hinton v. Hinton, 2 Ven. S. 684;
Lloyd v. Lloyd, 4 Dru. & W. 354, 370.

(*e*) *Farley v. Bonham*, 2 J. & H. 177.

(*f*) *Pondrell v. Jones*, 2 Sm. & G. 407; 3 Eq. R. 68; *Smith v. Adams*, 18 Beav. 492; 5 De G. M. & G. 712.

case of mere separate estate, his concurrence is desirable, in order that no question may afterwards be raised by him as to whether his marital rights have been effectually excluded.

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So now, under sect. 6 of the 37 & 38 Vict. c. 78, where a married woman conveys or surrenders any freehold or copyhold hereditament which is vested in her as a bare trustee, the concurrence of her husband may be dispensed with. The Act does not define what is meant by "a bare trustee" in this and the preceding section; and the term is generally considered to be ambiguous: but it will probably be held to mean a trustee, to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in Equity to convey the estate to them or by their direction, and has been requested by them so to convey it.

or where his wife is a bare trustee.

The arrangement of the parties is not a matter of any essential importance; but it is usual and convenient to arrange them in the order in which they are to act in the operative part of the conveyance.

Arrangement of parties.

It used to be a common practice to insert in the description of the parties a short statement of the capacities in which they concur in the deed; but this is seldom desirable, and has fallen into disuse. It may however still be desirable to resort to it, where the same person concurs in different capacities; unless the nature of his several interests is sufficiently disclosed in other parts of the deed (*g*). Of course, where a deed is to be executed under a power of attorney, the principal, and not the attorney, is named as a party.

Description of parties.

Where trustees purchase copyholds held of a manor, in Admittance of

(*g*) See *Faussett v. Carpenter*, 2 Dow. & Cl. 232; Sug. H. L. 76; and see *Carter v. Carter*, 3 K. & Jo. 684.

One trustee on purchase of copyholds.

one trustee on purchase of copyholds.

which the fines are arbitrary, it is not uncommon to let only one trustee be admitted, so as to save the increased fine which would be payable upon a joint admittance. Trustees, however, can scarcely be advised to consent to this, except under a sufficient indemnity or the order of the Court, as in the event of the early death of the admitted trustee, the result may be a loss, instead of a gain to the trust estate.

(3.) *As to the recitals.*

Section 8.

As to the recitals.

Recitals to be used, with what object.

A difference exists among conveyancers as to the legitimate use of recitals: some practitioners employing such only as will give an insight into the interests and objects of the parties to the deed, sufficient to render the subsequent parts clear and intelligible; while others introduce matter which, although clearly irrelevant, *e.g.*, the recital of the probate of a will of real estate, or of the places of burials, marriages, and baptisms, &c., is yet calculated to save trouble upon future investigations of the title. It is submitted, that, as a general rule, subject of course to special exceptions, no recital should be admitted which has not a logical connection with some operative part of the draft, and that the purpose of the other class of recitals may be well answered by a memorandum indorsed on the deed, and signed by the parties conversant with the facts (*h*).

Whether desirable in disentailing assurances.

So, in disentailing deeds, the statutory effect of which is independent, not only of the motives, but even of the expressed intention of the parties (*i*), recitals seem to be in general useless, and therefore inexpedient; especially since the enrolment of these conveyances in a public office is open to all the objections, and is attended by few of the

(i) As to the use of recitals, see *Dev. Convey. Vol. I., p. 41, et seq.*

(5) See 2 & 3 Will. IV. c. 74, s. 21.

benefits, incident to registration of titles under the protective Statutes. A simple conveyance by A. of a specified estate, or of all the lands held by him as tenant in tail under a specified settlement or in a specified locality, and the mere consent of B. as protector, either generally or under the limitations of any specified instrument, are quite as effective, and, usually, as intelligible, as they would be if preceded*by the most elaborate statement of the previous title, or of the motives which induce the parties to do that which, when done, takes effect without any regard to motive.

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Nevertheless, in particular cases, it may frequently, with a view to the present practice, in framing conditions of sale, of making recitals evidence (*k*), be expedient to introduce into conveyances, statements of facts which may tend to validate the title, although they may be inconsistent with the strict logical unity of the draft.

Sometimes desirable, as creating evidence in support of title.

A grantor, who is not an absolute owner, may and should, as a general rule, require such matters to be recited as will be sufficient to show that he is justified in making the assurance.

Should show vendor's right to convey.

As a release of claims, however generally expressed, is confined by a rule of Equity to matters of which the releasor is cognizant, it is very important, in a deed of this description, that the origin of the several claims, and all the circumstances connected with them, should be clearly stated in the recitals (*l*). Where the conveyance or release of an estate is part of a general arrangement, the recitals should show that those acts or assurances which are to form the consideration for such conveyance or release, have been already done or perfected: and should not, as often happens, merely state an intention to do or perfect them. Such a

Recitals in a release of claims.

(*k*) As to recitals, &c. being evidence, see now 27 & 28 Vict. c. 78, sect. 2.

(*l*) This applies also to deeds of indemnity.

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recital suggests an inquiry whether such intention was carried out, and a demand for evidence of such being the fact.

Recitals—
where to com-
mence.

The recitals, if considered with reference to the interests of the purchaser, should, as a general rule, go back sufficiently far to show a clear root of title; and be thence continued, in regular order, down to the date of the conveyance. Occasionally, a strict adherence to this rule would bring upon the face of the conveyance, matters which are better excluded: and not unfrequently, in small transactions, the mere number of the documents to be recited may, on the ground of expense, justify a departure from the more regular course. In either case the draftsman may often meet the difficulty, either by a recital stating what he conceives to be the effect of the documents, *viz.*, the actual existing relative rights and interests of the conveying parties in the property; or even in some cases by a mere recital of the contract for sale. Special recitals of this description should, however, be employed with caution by inexperienced draftsmen; and, when they are employed, extraordinary care will often be required in framing the covenants for title. Generally there is less reason for reciting, fully or at all, documents which will be handed over to the purchaser on completion, than those which will be retained by the vendors. Sometimes it may, with regard to the present practice of conveyancing and the ordinary conditions of sale throwing upon purchasers the expense of attested copies and making recitals evidence, be desirable to go back in the recitals even beyond the last instrument which constitutes a good root of title: for instance, on the purchase, with a view to a subdivision and resale (say for building purposes) of land, part of a large family estate, it may, when the title is voluminous, and also *free from all doubt*, be desirable to go back in the recitals sufficiently far to show such a title as would probably in point of duration satisfy sub-purchasers.

Arrangement
of recitals.

The Chronological arrangement is generally the best: but

when separate estates or interests are to be dealt with, the draftsman may often advantageously group together such recitals as relate exclusively to any particular estate or interest.

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In reciting a power, no more need be set out than is sufficient to show that it authorizes what is proposed to be accomplished: for instance, on a sale under the usual power of sale and exchange, it is unnecessary to recite any expressions relating exclusively to exchanges; or, if there be a sufficient power for the trustees to give receipts, to recite the trusts of the purchase-money: so, if the power runs in the usual form, and the sale is by *all* the *original* trustees, there is obviously no purpose answered by showing that it extended to "the survivors and survivor of them and the heirs of such survivor;" if, on the other hand, there has been a change in the trustees, it will be necessary to show that the will or settlement authorized such change, and contained expressions sufficient to enable the new trustees to exercise the same powers as their predecessors in the trust. Of course, so much of the instrument creating the power must be set out as may, with the aid of subsequent recitals, be sufficient to show that the power has become exerciseable and that all necessary consents (if any) have been given: and parties whose consent is requisite, should, if possible, express such consent on the face of the assurance.

Mode of re-
citing powers.

But when upon a sale under a power any parties who would be interested in the property in case the power were not exercised, agree to concur in the conveyance, the recitals, in addition to the power, should also show the nature of the interests which, subject to its exercise, are vested in such concurring parties.

Limitations in
default of ex-
ercise of power
of sale, when
to be recited.

It must always be remembered by the draftsman that recitals, although generally highly expedient, are not strictly essential to the operation of an assurance; every case resolves

Recitals are
matters of con-
venience, not
of necessity.

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itself into a question of present or future convenience. Even in the case of a release of a doubtful right, although it is in the very highest degree expedient to show upon the face of the assurance that the party executing it did so with a full knowledge of facts, and of the questions arising upon them, it would be sufficient, in order to sustain the instrument, to show *aliunde* that such knowledge was actually possessed by the releasing party.

Their effect
on operative
part of deed.

Recitals, although they may explain doubtful expressions, will not cut down the plain effect of (m), nor ordinarily supply a total omission in (n), the operative part of a deed: but, in a late case, where a married woman was made a party to, and executed and acknowledged, a conveyance by her husband, and the recitals showed that she concurred in order to bar her dower, but her name was omitted in the operative part of the deed, and in the covenants for title, it was nevertheless held, even as between vendor and purchaser, that her dower was barred (o). And, as a general rule, where there is a discrepancy between the recitals and the operative part, the former being clear as to what is intended to be conveyed, and the latter containing wide sweeping words of conveyance, the operation of the latter will be restricted (p). Thus, where a settlement recited that by virtue of divers assurances, certain specified properties, "and all other the freehold hereditaments in the county of York thereafter expressed to be appointed and released," were limited as the settlor should appoint, and then to him in fee, and the settlor appointed and released the specified properties, and all other his freehold heredita-

(m) *Holliday v. Overton*, 14 Beav. 487; and see cases cited.

(n) *Hammond v. Hammond*, 19 Beav. 26.

(o) *Dent v. Clayton*, 10 Jur. N. S. 571.

(p) *Re Duke of Lord Kensington*, 2 K. & J. 753; *Re Hugh Wen's Trusts*, 4 Jur. N. S. 6; *Hopkinson v. Lusk*, 10 Jur. N. S. 235; *Young v. Smith*, 11

Jur. N. S. 968; *Childers v. Eardley*, 28 Beav. 648; *Willoughby v. Middleton*, 2 J. & H. 344; and see also *Monypenny v. Monypenny*, 9 H. L. Ca. 114; 3 De G. & Jo. 572; 4 K. & J. 174; *Barratt v. Wyatt*, 20 Beav. 443; but see as to, covenant being controlled by a settled or ripe word, *Magdalen v. Lane*, 10 Jur. N. S. 56, 59, *et quare*.

ments in the county of York, it was held that an estate in that county of which the vendor was seised in fee, but not under the specified instruments, did not pass (g).

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So, in the converse case, the generality of the recitals may be restricted by the form of the operative part of the deed. Thus, where in a marriage settlement, there was a recital of an agreement to settle the wife's after-acquired property, followed by a covenant which was binding on the husband alone, it was held that the operation of the covenant was not extended by the general form of the recital (i).

May be restricted by operative part of deed.

In one case, a question was raised and not decided, whether, when a purchase deed contained a recital of the vendor's title, the purchaser upon being evicted was not estopped from questioning the accuracy of such recital in an action on the covenants for title (s): the question appears, however, to have been decided in the negative in a later case (t), where the Court held that where a recital is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the instrument (u): and this seems to be the reasonable doctrine.

Of vendor's title; whether purchaser estopped thereby.

A recital that the purchase-money has been paid, is, at Law, equivalent to a release for the amount (x).

Recital of payment.

Where the purchase deed contains a recital that the vendor is seised *or otherwise well entitled* in fee free from

(g) *Jenner v. Jenner*, L. R. 1 Eq. 361.

(r) *Young v. Smith*, L. R. 1 Eq. 186; and see *Ramaden v. Smith*, 2 Drew. 298.

(s) *Young v. Raincock*, 7 C. B. 310.

(t) *Stroughill v. Buck*, 14 Q. B. 781. But the recital will bind the vendor and parties claiming under him; *Doe v. Stone*, 3 C. B. 176; and

see *Wyles v. Woodward*, 5 Exch. 557.

And see also as to estoppel by recitals, *Saunders v. Merewether*, 11 Jur. N. S. 655; *Morton v. Woods*, L. R. 3 Q. B. 658.

(u) See *Hills v. Laming*, 9 Exch. 256; *Saunders v. Merewether*, *supra*.

(x) *Fowkes v. Porter*, 3 Car. & K. 309.

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incumbrances, and at the date of conveyance he has only an equitable interest, but subsequently acquires the legal estate, it would seem that the recital, as it is not inconsistent with the fact, creates no estoppel so as to pass the legal estate to the purchaser (y).

Written agree-
ment, when to
be recited.

Where a deed is executed pursuant to a written agreement, it is generally inexpedient to recite that agreement, and so bring it upon the title, unless it be material to the full operation or validity of the deed; as in the case of a post-nuptial settlement, where it is generally proper to recite prior articles, in order to show that the settlement is not voluntary. So, where either party to a contract dies before its completion, the contract itself, as a general rule, becomes part of the title, and should be recited in the conveyance. The recital, very commonly introduced, of the sale having been by auction under certain printed particulars, and conditions, inasmuch as it may lead to future inquiry respecting the nature of these particulars and conditions, is generally worse than useless, save in those cases which, except on sales by the Court of Chancery, are very rare, where the recitals show that such a mode of sale was the only proper one.

Recitals of
objections to
deed of con-
firmation.

Where a person executes a deed for the purpose of removing objections to the title, and the deed merely mentions their existence, without specifying them or showing that objections have been withheld from him, and he asks no questions, he will, as between himself and the purchaser, be bound, although in fact unaware of their real nature (z): and it is presumed, that a person executing such a general confirmation, even although in fact deceived as to the real nature of the objections, would be bound, if the purchaser

(y) *Heath v. Crealock*, L. R. 10 Ch. Ap. 22, 80, affirming *V. C. B.*, L. R. 16 Eq. 215.

(z) *Ven. 431*. A mere voluntary

confirmation of a prior fraudulent sale, the confirming party being still under pressure, cannot be relied on; see *Addis v. Campbell*, 4 Beav. 401.

had no notice of the deception. A general confirmation would appear to be the most eligible for the purchaser; but the party confirming should ordinarily insist on the particular objections being specified, and in terms confine his confirmation to their removal.

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Sect. 3.

(4.) *As to the consideration—words of conveyance—
and parcels.*

Section 4.

Care must be taken in preparing the deed to state truly the consideration paid by the purchaser, and upon which *ad valorem* duty will have to be paid; as the omission to do so, although it will not affect the sufficiency of the stamp, or the validity of the deed (a), will expose the parties who prepare the deed to severe penalties, and the vendor to an action by the purchaser for the return of the unexpressed consideration (b). Where fixtures, standing timber, or any other parts of the inheritance are taken at a valuation, its amount must be included in the consideration; but moveable chattels which pass by delivery may be handed over, and receipts may be given for them and for their price; if, however, they be for any reason assigned by deed, the *ad valorem* duty attaches, and their price must be stated; and it would appear that the recital in a deed of such sale and delivery (which has been very frequent in practice) renders the duty payable, unless the articles are of such a kind as would come under the description of goods, wares, or merchandise (c).

As to the consideration—
words of conveyance—and
parcels.

Consideration
—to be truly
stated.

Duty payable
on fixtures,
timber, &c.

Chattels
passing by de-
livery.

Recital of sale
—its effect.

(a) Tilsley on Stamps, 1st edit. 250.

(b) See 48 Geo. III. c. 149, ss. 22 to 26; 55 Geo. III. c. 184, s. 8; *Gingel v. Perkins*, 4 Exch. 720; and see now 33 & 34 Vict. c. 97, sect. 10. See also 13 & 14 Vict. c. 97, s. 10, remitting penalties incurred prior to the 20th March, 1850, in respect to the omis-

sion from leases of the consideration paid by the lessee to the party who held the original agreement for the lease; see *Att.-Gen. v. Brown*, 3 Exch. 662; and 33 & 34 Vict. c. 45. The provision as to penalties does not apply to a partition deed: *Henniker v. Henniker*, 1 El. & B. 4.

(c) *Horsfall v. Hey*, 2 Exch. 778.

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On sale of
property sub-
ject to a
mortgage.

Where the consideration consists wholly or in part of a debt due to the purchaser, or where the property is conveyed subject to the payment or transfer of any money or stock, whether charged on the property or not, such debt, money, or stock is subject to duty, and its existence must therefore appear upon the face of the deed (*d*).

Apportion-
ment of con-
sideration, on
purchase of
copyholds and
other pro-
perty.

Where freeholds or leaseholds are purchased together with copyholds, or customary freeholds, at an entire price, and the copyholds, or customary freeholds, have to be assured by surrender, it is necessary, for the purposes of the Stamp Act (*e*), to apportion the price between them and the other property (*f*); and this may be done so as to reduce the duty to a minimum, without any regard to the actual relative values of the estates: so, where estates are purchased by two or more at an entire sum, and the purchasers take separate conveyances, or where estates of different tenures or held under different titles are purchased at an entire sum, but are conveyed to the purchaser separately by separate instruments, the purchase-money may, for the purpose of diminishing the duty, be apportioned on the face of the conveyances in such manner as the parties think fit (*g*), without regard to the actual value of the estates, or (in the case of there being several purchasers) to the pecuniary arrangements between the parties; but under the new scale of duties, a merely insignificant saving can be thus effected.

What duty
payable on
conveyance
direct to sub-
purchaser.

Where, after the contract but before conveyance, the property is sold and conveyed direct to a sub-purchaser, *ad valorem* duty is payable on the amount of his purchase-money (*h*); and this, it would seem, whether it be less or more than the original purchase-money.

(*d*) 33 & 34 Vict. c. 79, sect. 73; and see 16 & 17 Vict. c. 59, s. 10; it had been held (see the preamble) that, under the General Stamp Act, duty was payable in respect of any such sum or debt only where the purchaser was personally liable, or bound, or undertook, or agreed to pay the same, or to indemnify the vendor against the same.

(*e*) Inasmuch as the duty upon the copyholds is charged on the surrender; and see 33 & 34 Vict. c. 97, s. 77; and sect. 84, *et seq.*

(*f*) 55 Geo. III. c. 184, Sched., title "Conveyance."

(*g*) 33 & 34 Vict. c. 97, sect. 74; and see *Clark v. May*, 13 May. 273.

(*h*) 33 & 34 Vict. c. 97, sect. 74; subject 3, 4, 5.

If a retiring partner conveys his share of the partnership estate to his partner, in consideration of the payment of a definite sum of money, or of an indemnity against an ascertained amount of partnership liabilities, *ad valorem* duty will be payable (i); but if the partnership assets are divided between the partners, then the transaction is in the nature of a partition, and the ordinary deed-stamp will be sufficient: except as respects any sum which may be paid by one partner to another, in order to equalise the shares.

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On conveyance by a retiring to a continuing partner.

We may here remark, that goodwill is property within the meaning of the Stamp Laws, and is liable to *ad valorem* duty on conveyance (k). Whether a *release*, as distinguished from an *assignment* by an outgoing to a continuing partner of his interest in goodwill is chargeable with the duty, has been considered questionable (l); but, under the late Stamp Act, it seems clear that it would be treated as a deed by which property is *vested in*, if not transferred to, the continuing partner, and as such liable to duty (m).

On sale of goodwill.

Where the consideration for a conveyance on sale consists wholly or in part of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of such stock or security; where it consists wholly or in part of a security which is not marketable, the duty is chargeable on the amount then due for principal and interest on the security (n). And the Act provides how the duty is to be charged where the consideration consists of periodical payments either for a definite period or in perpetuity, or for an indefinite period not terminable with life, or for life (o).

Sale in consideration of transfer of stock

(i) See sect. 78 of 33 & 34 Vict. c. 97, which extends the liability to *ad val.* duty to every deed transferring property, except a conveyance or transfer on the appointment of a new trustee. See too, sect. 70 as to what is a "Conveyance on sale."

(k) *Att.-Gen. v. Foster*, 33 L. T. 369, overruling *Warren v. Howe*, 2 B.

& C. 281.

(l) *Dav. Conv.* vol. II. 516.

(m) *Vide note* (i) *supra*.

(n) 33 & 34 Vict. c. 97, sect. 71; and compare the Schedule to 13 & 14 Vict. c. 97.

(o) See sect. 72; and see further to stamps *infra*, Ch. XIII., sect. 9.

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Compensation
money on sale
to railway
company.

In the case of a conveyance under the Lands Clauses Consolidation Act, or any Act of Parliament containing similar provisions, care should, of course, be ordinarily taken, that the sum expressed to be paid as the consideration for the purchase of land, does not include money paid merely by way of compensation for damage to adjacent property; as the latter amount is not subject to duty.

Operative
words used
only in present
tense.

Except in the case of a feoffment (a mode of conveyance now almost obsolete), it has become unusual to insert the operative words of conveyance in the past as well as in the present tense.

Feoffments by
a corporation.

A feoffment was formerly a common form of assurance on sales by corporations, in consequence of the doubt whether such bodies, from their incapacity of being seised to uses, could convey by lease and release, except in cases where the lease was a common law demise, perfected by actual entry: there can, however, be no question as to their competency to convey by grant under the 8 & 9 Vict. c. 106. Feoffments are now rarely used in this country, except in the conveyance, for valuable consideration, of an infant's land under the custom of gavelkind (p).

Forms of conveyance used
in the colonies.

In Australia, and in some other of the Australasian colonies, freehold lands in possession are, it is understood, generally conveyed by feoffment, or by grant. Except in Calcutta, and those localities where land has been acquired and subsequently sold by the Indian Government, there does not appear to be any real estate in India which can be considered as held in fee simple; the ordinary English conveyances are, however, generally adopted in transactions between Europeans. By the 31st of the Acts of the Legislative Council of India for the year 1854 (but which only applies to cases governed by the English Law), it is enacted that any estate or interest in immovable property situate in

(p) As to this custom, and the restrictions on the mode of alienation,

see Dav. Convey. vol. II. 221; also Elton on the Kentish Tenures.

the territories in the possession, or under the control, of the East India Company, whether in possession, remainder, or reversion, may, in addition to any other mode of conveyance or release then valid, be conveyed, passed, or released by a simple deed, whether such deed operate under the Statute of Uses or not. By the same enactment, words of limitation in a deed are no longer requisite to pass an estate in fee simple: and an estate limited to heirs is not to unite with a prior life estate in the same deed; nor is a *bond fide* purchaser of property, the proceeds of which when sold are subject to a trust, in any case bound to see to the application of the purchase-money (q).

Our Courts will apply the general law of this country (being abstractedly just and not exclusively founded on any particular or technical rule) to questions relating to land in a colony where a different system of jurisprudence prevails; unless it is shown or suggested that the laws of the colony are different on the point in question (r).

Many practitioners when settling a conveyance on behalf of mortgagees or trustees are astute in introducing, in connection with the words of conveyance by their own clients, qualifying expressions such as "according to their estate and interest if any," and "if and so far as they lawfully can or may, but not further or otherwise," &c., which are of little practical importance; except that when they are introduced the parties should enter into a clear and direct covenant that they have done nothing to encumber or affect the title to the property; for a covenant merely that they have done nothing to prevent their conveying "in manner aforesaid," amounts, in fact, to nothing. Where, however, a

As to expressions protective of trustees, &c

(q) See as to real property in India, *Protnam v. Fairlie*, 1 Moore's Ind. Ap. 366; *Gardiner v. Fell*, 1 J. & W. 22. As to the forms of conveyance in the North American Colonies and West India Islands, see Appendix to Burton's Compendium, and 2 Jarm. Conv. by S. 393, et seq.; 3d. vol. vi.,

p. 136; and *Waterhouse v. Stansfield*, 10 Ha. 254.

(r) *Bentley v. Willink*, 2 H. & A. 5. As to the sanctity of customary freeholds see the case of *Graves v. Jackson*, 6 Q. B. 811; 14 L. J. N. S. 129; and cases there cited.

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party concurs merely in some particular capacity or capacities, this should plainly appear on the face of the conveyance; lest his other rights, if any, not being reserved should be deemed to pass (s).

Reference to
Act dispensing
with lease for
year unneces-
sary.

The reference to the Statute which rendered a lease for a year unnecessary, although still of occasional occurrence, is rendered useless by the subsequent enactment, that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be held to lie in grant as well as in livery (t).

Parcels, how
to be de-
scribed.

Care requisite
in the use of
plans.

In describing the parcels, a description by reference to a schedule, or to a schedule and map, has become very usual, and is generally convenient (u). Care, however, should be taken in using a plan to have either a substantive description of the property in the body of the deed or in the schedule, so as to let the plan be merely in aid and explanation of this description, or else to insure perfect accuracy in the plan itself. This is particularly requisite in conveyances or leases of mines or other subterraneous strata, or where land is cut up for building purposes, or is otherwise conveyed by reference to imaginary lines of demarcation. In such a case, a slight error in the drawing of the plan may be attended with very serious consequences. For instance, where a piece of land was conveyed by the description of "a small piece marked in the plan as 153, b," containing 34 perches, and the plan was drawn to a scale, and 153, b, being a piece marked off on the plan from a close numbered 153, contained according to the scale only 27 perches, it was held that no more passed; although there

Effect of error

(s) See and consider *Faussett v. Carpenter*, 2 Dow. & Cla. 232; Sugd. H. of L. 76; and see *Carter v. Carter*, 3 K. & J. 424.

(t) 8 & 9 Vict. c. 106, s. 2.

(u) See, as to the effect of a variance between a schedule to a conveyance and an induried map, *Llewellyn v. Earl of Jersey*, 11 M. & W. 183;

and as to the schedule and map, restricting the description in the body of the deed, *Barton v. Davies*, 19 L. J. 302, C. P.; and *Wales v. Trevanion*, 15 Q. B. 738; *Baker v. Richardson*, 6 W. R. 663. See, too, the First Report of the late Registration Commissioners, recommending maps as the basis of a General Register.

was little doubt that the plan was incorrect, and that 153, b—which was a valuable strip of frontage—was intended by both parties to extend to a point corresponding with the extent of some adjoining back land, and to which it would have extended had it in fact contained 34 perches instead of 27 perches (*x*); the result being that part of the back land, which was comprised in the sale, was left without a frontage. The question of parcel or no parcel is a question of fact for a jury to decide; but it is the province of the judge to explain to the jury how the map, as any other portion of the deed, is to be construed (*y*).

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Upon the sale of lands adjoining an ancient highway, the ordinary rule is, that the road *usque ad medium flumē vicę* passes by the conveyance; and the fact of the parcels being set forth by admeasurement, and being shewn on a plan which does not comprise any portion of the road, does not exclude the operation of the rule (*z*): so, too, in the case of land adjoining a non-navigable river or stream.

Where the land adjoins an ancient highway.

So, where the occupancy of the property is referred to, care should be taken to have a substantive and sufficient independent description; otherwise the effect of the deed will depend upon evidence of the fact of occupancy; and nothing which cannot be strictly proved to have been so occupied, will pass (*u*). Where, as is not unfrequently the case, the reference to occupancy is in the following form: "all that messuage, &c., as the same is now, or lately was, in the occupation of A. B.," it might not unreasonably be considered as intended to restrict the purchaser's enjoy-

Reference to occupancy.

(*x*) *Llewellyn v. Lord Jersey*, 11 M. & W. 183; and see *Barton v. Davies*, 10 C. B. 261; *Harris v. Pepperell*, L. R. 5 Eq. 1. See, too, *Davis v. Shepherd*, L. R. 1 Ch. Ap. 410, where the supposed direction of a fault which was to be the boundary of a mine was shown upon a plan; and *Lyle v. Richards*, L. R. 1 E. & Ir. Ap. 222; a

case of disputed boundaries between grantees of contiguous mines.

(*y*) See and consider *Lyle v. Richards*, L. R. 1 E. & Ir. Ap. 222.

(*z*) *Berridge v. Ward*, 7 Jur. N. S. 376; 10 C. B. N. S. 400; and see *Dendy v. Simpson*, 7 Jur. N. S. 1058.

(*a*) *Dyne v. Nulley*, 14 C. B. 122.

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ment of the property, in the way in which it was enjoyed by A. B. It has, however, been held, that the purpose of the reference, as thus framed, is merely to identify the property, and not to restrict its beneficial enjoyment (b).

Error of de-
scription.

But where the deed contains an adequate and sufficient definition, with convenient certainty, of what is intended to pass (c), any subsequent erroneous addition will not vitiate it; according to the maxim *fulsa demonstratio non nocet*. For instance, under a conveyance by A. of all his meadow Blackacre, described as containing 10 acres, but which in truth contains 20 acres, the whole 20 acres will pass (d): so, under a conveyance by A. of all his farms X, Y. and Z, in the parish of M., in the occupation of B., farm X. would pass, although in fact occupied by C.: but if the premises are described in the general terms, and then a particular description is added, the latter, it has been usually considered, controls the former (e): e.g., if the conveyance were simply of all A.'s farms in the parish of M., in the occupation of B., no farm would pass which was not in fact so occupied: but this was decided differently upon a late case arising under a will, and upon principles which apparently apply as well to a deed (f). It is seldom, however, that such a question could arise upon a purchase-deed.

In a later case, where the parcels were described as "all that messuage with the lands, &c., situate, &c., and now, or late in the occupation of R. B.," and then followed a particular, but not exhaustive, description of certain of the closes of which R. B.'s farm consisted, the Court of Exchequer held that only the closes expressly specified passed by the deed (g). We have already seen that wide sweeping

(b) *Martyr v. Lawrence*, 2 De G. & S. 261, and cases there cited; and see *Polden v. Bastard*, L. R. 1 Q. B. 186.

(c) *Per Parke, B.*, 11 M. & W.

169.

(d) See *Shep. T.* 243.

(e) *Doe v. Galloway*, 5 B. & Ad. 51.

(f) *Doe v. Carpenter*, 16 Q. B. 181; and see *Wood v. Rowcliffe*, 6 Exch. 407.

(g) *Griffiths v. Penson*, 9 Jur. N. S. 385.

words of conveyance may be restricted by recitals, clearly shewing what is intended to be conveyed (*h*).

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The contract for purchase cannot, in general, be used in a Court of Law as evidence of what passed by the conveyance (*i*); but a different rule would probably be adopted in Equity.

Contract not evidence.

It has been held that the steward of a manor may insist upon a surrender containing a substantive description of the tenements, and may object to a mere reference to the description in a former surrender (*k*).

Description of parcels in surrender of copyholds.

In a conveyance to a railway or waterworks company, if within the provisions of the Consolidation Acts, care must be taken to specify the mines and minerals, if intended to be included; for, unless actually specified, they will not pass (*l*). The reservation in such a conveyance of a right to work the minerals is subject to an implied obligation to afford the requisite lateral and subjacent support to the railway (*m*).

Mines, &c., if purchased by railway or waterworks company must be specified.

On the sale of a reversion, the better mode of description is to particularise the *corpus* of the property, and to convey it subject to the particular precedent estates; and not to convey the reversion *eo nomine*: for instance, if A., entitled to Blackacre expectant on the decease and failure of issue of B., sells his estate, the preferable mode of describing it is, to convey Blackacre itself, *habendum*, subject to the life estate of B., and the estates limited to his issue: and not to convey, in terms, all that *the reversion* of A. under an In-

Mode of describing reversions.

(*h*) See *Rooke v. Lord Kensington* 2 K. & J. 753, and *supra*, p. 522.

(*i*) *Williams v. Morgan*, 15 Q. B. 782.

(*k*) *The Queen v. Lord of the Manor of Bishop's Stoke*, 8 Dowl. P. C. 608.

(*l*) See 8 & 9 Vict. c. 20, s. 77; 10 & 11 Vict. c. 17, s. 18.

(*m*) See *Caledonian R. Co. v. Sprot*,

2 Jur. N. S. 623; 2 Macq. 449; and see *Roobotham v. Wilson*, 2 Jur. N. S. 736; 3 E. & B. 593; 8 E. & B. 123; 8 Jur. N. S. 965; 8 H. L. Ca. 348; *Metrop. Board of Works v. Metrop. R. Co.*, L. R. 3 C. P. 612; *Richards v. Jenkins*, 17 W. R. 30, and cases cited *supra*, p. 370.

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deature dated, &c., expectant on the demise of B. and the failure of his issue, of and in Blackacre:—for, under the latter words of description, if a mistake be made either in the instrument under which the reversion is claimable, or as to the precise extent and nature of the precedent estates, it is at least doubtful whether anything would pass.

General
words.

The long enumeration formerly known in a conveyance as the “general words,” is greatly shortened in modern practice, and is frequently superseded by the expression “rights, members, easements, and appurtenances:” if there seems to be reason to specially notice any right or easement it may be specified, with the introductory words “and in particular, all that, &c.” Of course, any right or easement intended to be created over other property must be accurately specified. Where buildings are conveyed, it may be well to specify “fixtures,” when such are intended to pass (n); and to specify “mines” in mining districts (o). The operation of general words, we need hardly observe, is restricted to the estate and interest which the grantor has at the date of the conveyance (p).

Their use.

General words may occasionally, under the reference to reputation, help out an omission in the parcels; but, with this exception, they seem to be of little practical use (q): for all rights and easements which are, either by implication of law or by express grant, annexed to the land, or connected with its user or enjoyment, would, there can be no reasonable doubt, pass with it to the assignee, although not enumerated or referred to; and, on the other hand, rights and easements which are not connected with the user or enjoyment of the land, are merely personal to the original grantee, and cannot be annexed to it, and would not pass to

(n) *Wickham v. Cottrell*, 1 E. & B. 674; and vide *infra*.

(o) *Halliday v. Dennison*, 4 Jur. N. S. 1063.

(p) *See Booth v. Alcock*, L. R. 8 Ch. Ap. 663; and see judgment of L. J.

Mellish, p. 667, as to the difference between a grant in general words, and an express grant of a specific right.

(q) But see *Wardell v. Brocklehurst*, 8 W. R. 241; 1 E. & E. 1052.

the assignee even under express words of assurance (r). Where, however, general words are inserted, the omission of any one of the particulars usually specified is to be attended to in construing the deed (s).

Where a lease contained a plan and a description by metes and bounds of the parcels to be demised, the word "stables," in the general words, was held insufficient to pass a stable which was not shown on the plan (t). The general words "all other improvements and additions," which usually close the enumeration of specified fixtures in a lessee's covenant to yield up possession, have a wide signification, and are not necessarily restricted to fixtures properly so called (u).

As a general rule, fixtures of every kind, including personal Fixtures, chattels incident to the freehold (as, *e.g.*, the locks and keys of a house, or the movable parts of fixed machinery,) pass, without being specified, by a conveyance of the land to which they are affixed, or incident; unless it can be inferred that there is an intention to exclude them. In some parts of the country, and especially in the manufacturing districts, fixtures and machinery are often sold separately from the land to which they are attached; and in every case where it is intended to include fixtures upon a sale or mortgage of buildings, general words sufficient to comprise them ought to be inserted: in many cases it may also be desirable to add a specific enumeration of particulars (x).

It is often very difficult to determine what articles are fixtures, properly so called, and what are mere movable chattels (y). Trade fixtures, which have been annexed to the

What are fixtures.

(r) See *Aakroyd v. Smith*, 10 C. B. 164, 188.

(s) *Halliday v. Dennison*, *ubi supra*.

(t) *Mailand v. Mackinnon*, 9 Jur. N. S. 255; 1 H. & C. 607.

(u) See *Burt v. Haslett*, 25 L. J. C. P. 295; *Wilson v. Whateley*, 1 J. & H. 436.

(x) See *Mather v. Fraser*, 2 K. & J. 536; *Fisher v. Dixon*, 12 Cl. & Fin. 312; and compare the doubtful cases of *Trappes v. Harter*, 2 Cr. & M. 153; *Hare v. Horton*, 5 B. & Ad. 715.

(y) See *Ex parte Barolay*, 5 De G. M. & G. 403; *Mather v. Fraser*, *ubi supra*, and cases there cited.

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freehold, not with the view of improving the inheritance, but solely for the purposes of trade, will, unless expressly excluded, pass by a mortgage of the freehold (a). Thus machines annexed in a quasi-permanent manner by means of bolts or screws for the mere purpose of steadying have been held to pass as fixtures (a); so, also, tramways used in connection with a colliery (b); so, also, looms fastened to the floor of a mill by nails driven into plugs of wood (c): but there was a contrary decision where the legs of the looms were merely dropped into holes made in the floor, without any substantial annexation to the freehold (d); as, also, where weighing machines were sunk into holes lined with brickwork, so as to make the weighing plate level with the surface of the ground, but were not fixed to the brickwork (e). Greenhouses constructed of wooden frames, and affixed by mortar to a foundation of brickwork, have been held to be fixtures (f); so also a plate-glass shop front, fixed merely by wooden wedges, and capable of being removed without injury to the freehold (g); so, tapestry stretched on wooden frames affixed to the wall, but capable of being readily removed, has been held to be a fixture (h). But not every annexation to the freehold is a fixture; nor on the other hand is a fixture, or an article deemed to be such, necessarily fastened to the freehold. Thus, statues, ornamental vases, and stone garden-seats retaining their positions merely by

(a) See *Ex parte Cotton*, 2 M. D. & De G. 725; *Cullwick v. Scindell*, L. R. Eq. 249; *Clinic v. Wood*, L. R. 3 Exch. 257; affirmed L. R. 4 Exch. 328; and see *Fisher v. Dixon*, 12 Q. L. & Fin. 312.

(a) *Longbottom v. Berry*, L. R. 5 Q. B. 123; and see comments on *Hellawell v. Eastwood*, 6 Ex. 205; 20 L. J. (Ex.) 154; see also *Holland v. Hodgson*, L. R. 7 C. P. 328; and see further as to what is or is not a sufficient annexation to the freehold, *Walmesley v. Milne*, 7 C. B. N. S. 115, *Huntley v. Russell*, 13 Q. B. 572; *Martin v. Roe*, 7 E. & B. 237.

(b) *Turner v. Cameron*, L. R. 5 Q. B. 307.

(c) *Boyd v. Shorrocks*, L. R. 5 Eq. 72.

(d) *Hutchinson v. Kay*, 23 Beav. 413.

(e) *Re Atbury*, L. R. 4 Ch. Ap. 630.

(f) *Jenkins v. Gething*, 2 J. & H. 520.

(g) *Burt v. Haslett*, 25 L. J. C. P. 295; 2 Jur. N. S. 974; but this was an improvement within the terms of the lease.

(h) *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; but see *Harvey v. Harvey*, 2 Str. 1141.

their own weight, but forming part of the architectural design of the mansion and grounds, have been held to be fixtures (*i*): so, straightening plates, *i.e.*, broad iron plates embedded in the floor, and used for straightening iron, when taken out of the furnace (*k*).

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We may here remark, that upon the conveyance of part of an estate, a grant of all such rights and easements over the residue retained by the vendor as are essential to the due enjoyment of the part conveyed, will, if there be nothing in the conveyance to negative the presumption, be presumed at Law: for instance, the grant of an absolutely necessary right of way (*l*), or of drainage (*m*), or of the right to the continued enjoyment of modern lights on the sale of a house (*n*), or of any other continuous easement necessary to the enjoyment of the property (*o*), or of the right to that extraordinary support by the adjoining soil which is requisite in order to support the buildings on the part conveyed (*p*): and, conversely, in the absence of any thing in the conveyance to negative the presumption, the Law will presume a reservation in the conveyance of all such rights and easements over the part conveyed as are essential

Implied grant
and reservation
of necessary easements.

(i) *D'Eyncourt v. Gregory*, *ubi supra*.

(k) *Ex parte Anthony*, L. R. 4 Ch. Ap. 630, 638; and as to rights of equitable mortgagee by deposit in respect of fixtures, see *Williams v. Evans*, 23 Beav. 239. As to other points connected with the law of fixtures, and as to registration under the 17 & 18 Vict. c. 36, see the note at the end of this chapter.

(l) *Pinnington v. Galland*, 9 Exch. 1; *Pearson v. Spencer*, 7 Jur. N. S. 1195; but nothing short of absolute necessity for the user will be sufficient to raise the presumption. See as to ways of necessity, *supra*, p. 362; and see *Gayford v. Moffatt*, L. R. 4 Ch. Ap. 133; *Davies v. Scar*, L. R. 7 Eq. 427.

(m) *Pyer v. Carter*, 1 H. & N. 916; *Ewart v. Cochran*, 7 Jur. N. S. 925.

See observations on *Pyer v. Carter*, in *Suffield v. Brown*, 3 N. R. 340; 12 W. R. 356; but see *Watts v. Kelson*, L. R. 6 Ch. Ap. 166, where *Pyer v. Carter*, was approved.

(n) *Supra*, p. 358 *et seq.* See Latham on the Law of Window Lights; and consider *Curriers' Company v. Corbett*, 2 Dr. & Sm. 355; and compare *Booth v. Alcock*, L. R. 8 Ch. Ap. 663.

(o) *Watts v. Kelson*, L. R. 6 Ch. Ap. 166; case of artificial underground watercourse.

(p) See *Smart v. Morton*, 25 L. T. 97; 5 El. & Bl. 30; *Dugdale v. Robertson*, 8 K. & J. 695; *Caledonian R. Co. v. Sprot*, 2 Macq. 449; *Roberts v. Haines*, 2 Jur. N. S. 999; 6 El. & Bl. 643; 7 El. & Bl. 625; and see cases cited, *supra*, p. 342.

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to the due enjoyment of the part retained by the vendor (q). But in order to pass rights which are not properly servitudes, the word "appurtenances" is insufficient; words amounting to an express grant must be used (r); and recent cases seem to show that, except as regards an easement of necessity, or an apparent and continuous easement, it is only an easement which has a legal existence prior to the two tenements becoming united in the same owner, which, on the disposition of one of them, will be considered as arising by implied grant or reservation (s).

In a recent case (t), where A. having a long term of years in tenement X, and a short subterm in Y, an adjoining tenement, demised X. with its "lights" and appurtenances to B., and then, after the expiration of the subterm, having acquired the fee simple in Y, built thereon so as to obstruct the lights in tenement X, the Court of Appeal held that the grant being in general terms must be measured by the extent of the interest which A. had in Y. at the date of the grant, and dismissed B.'s bill for an injunction with costs.

Where a right of way, &c., passes under the words, "all ways, &c., usually held or enjoyed."

Where land was conveyed with "all ways, paths, passages, &c., to the same belonging, or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed," a right of way which had been usually enjoyed with the property, was held to pass (u): but mere general words will not pass such a right of way, unless there are other words clearly showing that this was the intention of the parties (x); thus, where the owner of two adjoining closes for his own con-

(q) See *Pinnington v. Galland*, 9 Exch. 1; *Pearson v. Spencer*, and *Worthington v. Gimson*, *ubi supra*; and see *Richards v. Rose*, 9 Exch. 218; *Murcillo v. Black*, 11 Jur. N. S. 608; *Davis v. Sear*, L. R. 7 Eq. 427.

(r) *Barling v. Rhodes*, 1 Cr. & M. 439; *Barling v. Fortune*, 7 Jur. N. S. 926, H. L. 1 and see *Grimes v. Peacock*, Bulst. 17.

(s) See and consider judgment of

Lord Westbury in *Suffield v. Brown*, 3 N. R. 340; 33 L. J. (Ch. 249; but see *Hatta v. Kelson*, *ubi supra*.

(t) *Booth v. Alcock*, L. R. 8 Ch. Ap. 663.

(u) *James v. Plant*, 4 Ad. & El. 749; but see *Thomson v. Waterlow*, *infra*.

(x) *Worthington v. Gimson*, 6 Jur. N. S. 1053; 29 L. J. Q. B. 113; and see *Grimes v. Peacock*, Bulst. 17.

venience, made a road over close B. to close A., during the unity of possession, and afterwards sold close A., "with all ways, easements, and appurtenances, to the same belonging now or heretofore used and enjoyed," it was held that, as the road had no existence prior to the vendor's ownership, it did not pass under the general words (*y*). This case was distinguished from *James v. Plant*, on the ground that in the latter there was an old right of road, which had been merely suspended during the unity of possession.

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On the severance of a tenement, a distinction is drawn between a continuous easement, such as a right of drainage, and a discontinuous easement, such as a right of way, as respects the enjoyment of the right being continued to the owner of the dissevered tenement. Thus, it has been held that where the owner of two or more adjoining houses sells and conveys one of them, the purchaser is entitled to the benefit of all the drains from his house, and takes subject to all the drains then necessarily used from the adjoining house, without any express grant or reservation (*z*). So, also, where the owner of two adjoining properties, X. and Y., during the unity of ownership and for his own convenience, made an underground watercourse through Y. to supply his cattle sheds on X., and first sold X. and then Y. to different purchasers, it was held that the purchaser of X. was entitled, without express grant, to the continued enjoyment of the right watercourse (*a*); and the circumstance that he had applied the water to a new and more beneficial use was not considered material (*b*). But on a severance or partition of a tenement, an ordinary right of way, not being a way of absolute

Distinction
between a
continuous
and a discon-
tinuous ease-
ment.

(*y*) *Thomson v. Waterlow*, L. R. 6 Ex. 36; and see *Langley v. Hammond*, L. R. 3 Exch 161. & Sm. 571; *Glave v. Harding*, 27 L. J. N. S. Exch. 286.

(*z*) *Pyer v. Carter*, 1 H. & N. 916; but see Lord Westbury's remarks on this case in *Sutfield v. Brown*, 3 N. R. 340. Sec, too, remarks of Blackburn, J., in *Polden v. Bastard*, 4 Best & Sm. 258, and in *Pearson v. Spencer*, 1 Best

(*a*) *Watts v. Nelson*, L. R. 6 Ch. Ap. 166, reversing on this point Lord Romilly.

(*b*) *Id.*; and see on this latter point a case of *Holker v. Porrett*, L. R. 10 Exch. 59.

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necessity, will not pass unless the grantor uses words sufficient to create the easement *de novo* (c).

Rights intended to be retained should be expressly mentioned.

In every case, where a vendor is selling part of his land, the nature and extent of the easements, or quasi-easements, which he intends to retain, should not be left to mere presumption. Unless the right to be reserved by implication is clearly essential to the enjoyment of the property retained, the ordinary rule that a grantor shall not derogate from his absolute grant, will prevent its being claimed against the purchaser. In one case, it was stated by V.-C. Kindersley as well settled law that if a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect any buildings he pleases upon the land so sold to him, however much they may interfere with the lights of the vendor's house (d).

What may be the subject of a reservation.

In the preceding remarks, the word "reservation" has been used in a general sense, as including any right and easement, or quasi-easement, which a vendor, on selling part of his property, may be desirous of retaining for his own benefit over the land conveyed; but a reservation, in the strict sense of the term, can only be in respect of something issuing out of the thing granted, just as an exception must be parcel of what would otherwise be the entirety of the thing granted. Thus, a right of sporting, or the like, cannot properly be made the subject of a reservation (e); and ought to be expressly re-granted or provided for in the declaration of uses, as above suggested (f); but in many cases, what purports to be an exception (or reservation) will be held to operate as a fresh grant (g).

(c) *Barlow v. Rhodes*, 1 Cr. & M. 448; *Worthington v. Gimson*, 6 Jur. N. S. 1059; and see *Wardle v. Brocklehurst*, Ell. & Ell. 1058; *Watts v. Kelson*, *ubi supra*, and cases cited in judgment of L. J. Mellish.

(d) *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355.

(e) *Graham v. Ewart*, 26 L. J. N. S. Exch. 42; and see *Wickham v. Hawker*, 7 M. & W. 63.

(f) *Vide supra*, p. 506.

(g) See *Wickham v. Hawker*, *ubi supra*; and *Durham and Sunderland R. Co. v. Walker*, 2 Q. B. 267.

Upon the sale of land, it is not competent to the vendor to create new rights, unconnected with its use or enjoyment, and annex them to it, so as to pass to assignees: *e.g.*, a right for the owners of close A. to walk over close B. for all purposes (*h*): nor to subject it to novel burdens (*i*): but where the conveyance of close A. contains a grant to the purchaser of the right to use "for all purposes" a way over a piece of land, lying between close A. and a street, this will be held to mean, "for all purposes which make it necessary to pass from close A. to the street," and not for all purposes whatsoever (*k*). A covenant by A., the owner of close X., with B., the owner of an adjoining close Y., that a certain stream of water should flow uninterruptedly along a specified existing channel through X. into Y., and that A. would cleanse the channel, and that in default B. might do so, has been held to prevent an alteration of the course of the stream even within the limits of close X.; although the point of outflow remained unaltered; and to be enforceable by the assignee of A. against the assignee of B. (*l*). So, a covenant by the purchasers that the vendor, his heirs and assigns should have the exclusive right of supplying beer to any public-house erected on the land, has been held to be enforceable in Equity (*m*).

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As to the creation, &c., of new easements.

The grant of deeds is now usually omitted: it seems inoperative if, as is usually the case, the deeds are delivered, or if the right to them is annexed to the estate conveyed; and if not inoperative, it is practically useless, as being too vague (*n*).

Deeds.

The clause beginning "and the reversion and rever-

Reversion clause.

(*h*) *Ackroyd v. Smith*, 10 C. B. 164; *Egerton v. Lord Brownlow*, 4 H. L. Ca. 1; and compare *Re Stockport Waterworks Co.*, 3 H. & C. 300; *Nuttall v. Bracewell*, L. R. 2 Exch. 1.

(*i*) *Ackroyd v. Smith*, *ubi supra*; and see *Keppell v. Bailey*, 2 Myl. & K. 535.

(*k*) *Thorpe v. Brumfit*, L. R. 8 Ch. *

Ap. 650.

(*l*) *Northam v. Hurley*, 1 El. & B. 665 and see as to the necessity for creation of new easements by grant *de novo*, *Worthington v. Gimson*, 6 Jur. N. S. 1053.

(*m*) *Cutt v. Tourle*, L. R. 4 Ch. Ap. 654.

(*n*) See Sugd. p. 440, *et seq.*

Chap. XII. sions, &c." is also usually omitted in modern practice, and
Book 4. seems to be useless.

Estate clause. "The clause beginning 'and all the estate, right, title, and interest, &c.' is generally retained, and may be occasionally of practical use. It does not, however, appear that it would even at Law, pass any interest in the property, which, from a general consideration of the deed, it may be collected was not intended to pass (o); but in the case of several vendors, who concur in assuring an estate, say in fee simple, there can, it is conceived, be no doubt that under the common clause the interests of all the conveying parties will pass, even although such parties, as between themselves, may in fact be entitled somewhat differently from what they supposed to be the case.

Dower uses—
whether to be
inserted.

It is still not uncommon practice, even when the purchaser has no wife to whom he was married before the late Dower Act came into operation, to convey the estate, if freehold of inheritance, to the ordinary uses to bar dower, in order to avoid the necessity, on future sales, of proving the non-existence of any such wife; and to add the common clause negating the right to dower. Where, however, the draftsman is aware that no such wife exists, it seems to be sufficient to recite the fact. It is also not uncommon for the draftsman to exclude the wife's dower, although he may have no special instructions to that effect. In theory, this is scarcely defensible. The purchaser may, under the new law, defeat his wife's dower by a conveyance, or by his will; and, in the event of his intestacy, the effect of a declaration in bar of dower may often be to prefer a remote heir to the wife. At the same time, it must be remembered that a mere general devise does not ordinarily exclude the wife's dower; although no doubt almost always intended to do so; and the writer, contrary to the opinion which he had long held on the point, is inclined to hold that the

(o) See *Hogg v. Rymant*, 9 Exch. K. & J. 113; *Rooke v. Lord Kensington*, 2 K. & J. 752; and see *Rooke v. Harrison*, 2

preferable practice is to insert the declaration. The common Chap. XII.
limitations in a conveyance executed before the late Dower Sect. 4.
Act came into operation, but without the express negative
of a right to dower, do not bar the dower of a woman mar-
ried subsequently to the commencement of the operation of
the Act (p). It is not necessary that the purchaser should
execute the conveyance in order to give effect to the
declaration against dower (q).

Under a limitation to uses to bar dower, not preceded by
any power of appointment, the purchaser may, as a matter
of strict right, require the concurrence of the dower trustee
in the conveyance: but an objection to the title on this
ground, though technically well founded, is considered
frivolous and vexatious (r).

Whether pur-
chaser can
require con-
currence of
dower trustee

(5.) *As to the covenants.*

Section 5.

The covenants for title are that part of the draft upon
which disputes and questions of difficulty most frequently
arise: they are of considerable, although, perhaps, to a pur-
chaser, of rather over-estimated importance: to the solicitor
they are important, inasmuch as he will be responsible to his
client for permitting him unknowingly to enter into improper
covenants (s); or for not securing to him those to which he
is entitled from the other party.

As to the
covenants.
Covenants for
title.
Solicitor's
liability in
respect
thereof.

No precise form of words is necessary to constitute a

Covenants,
how con-
stituted, &c.

(p) *Fry v. Noble*, 1 Jur. N. S. 767;
28 Beav. 508; 7 De G. M. & G. 687;
Clarke v. Franklin, 4 K. & Jo. 266.

(q) *Fairley v. Tuck*, 3 Jur. N. S.
1089; 6 W. R. 9; and see further as
to the effect of a general devise on
the widow's right to dower, and as to
her being put to her election between
her dower and the devised estate
Ellis v. Lewis, 3 Haro. 310; *Bendling*
v. Bendling, 3 K. & J. 257; *Gibson v.*

Gibson, 1 Drew 42; *Rorland v. Cuth-*
bertson, L. R. 8 Eq. 466; *Parker v.*
Sowerby, 4 De G. M. & G. 321;
Thompson v. Burra, L. R. 16 Eq.
502; *Watson's Compendium of Equity*,
p. 352, and cases there cited.

(r) *Collard v. Roc*, 4 De G. & J.
525.

(s) *Stannard v. Ullithorne*, 10 Bing.
491.

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covenant, if only there is an agreement by deed (i); and if the covenantor adopts the deed in other respects, his non-execution of it is not material for the purpose of binding him by his covenant (u). If the covenant is contained in a deed poll, the covenantee should be named or defined therein; and if in an indenture he should be made a party: but as respects *hereditaments* the benefit of a covenant contained in an indenture executed after the 1st October, 1845, may be taken, although the taker be not named a party (x). Covenants may, of course, be entered into by reference to those in another instrument (y).

What covenants entered into by absolute beneficial owner

A vendor, if the absolute beneficial owner, enters into the usual covenants that he has good right to appoint and release, assign, or surrender (as the case may be, according as the estate is freehold, leasehold, or copyhold), for quiet enjoyment, free from encumbrances, and for further assurance (z).

What usual covenant by, may be omitted.

It is usual to insert in a conveyance by appointment a covenant that the power was well created and is subsisting, and in an assignment of leaseholds, a covenant that the lease was a valid demise and that the term is subsisting; but these covenants are, in effect, comprised in the covenants for right to appoint and for right to assign; and consequently are often omitted. The vendor of leaseholds also covenants that the rent has been paid up to the last day of payment, and that all other the lessee's covenants have been performed up to the date of the assignment.

(i) *Carr v. Roberts*, 5 B. & Ad. 82; *Wood v. Copper Miners' Co.*, 7 C. B. 906, 936; *Highby v. G. W. R. Co.*, 14 M. & W. 816; *Adry v. Arnold*, 16 Jur. 1129.

(u) *Archers v. Conslating*, 6 M. & Gr. 75.

(x) See B. & 9 Vict. c. 106, s. 5.

(y) *De Stropen*, 1 De G. M. & G. 576.

(z) See *Church v. Brown*, 15 Ves. 263, 264. See as to renewable leaseholds, *Fane v. Earl of Rensfury*,

1 Ir. Ch. R. 321. As to whether there is any implied warranty on sale of copyright, see *Sims v. Murray*, 17 Q. B. 281. *Semble*, that there is, as regards executory contracts generally for sale of chattels. In the absence of express agreement, the assignor of a patent does not warrant its validity, *Smith v. Nettle*, 2 C. B. N. S. 67; *Smith v. Scott*, 6 C. B. N. S. 771. See as to covenants for further assurance, *Davis v. Tollenmache*, 2 Jur. N. S. 1181; and *infra*.

The covenants of a vendor who is absolute beneficial owner, if he have acquired the estate by purchase for money or other valuable consideration, are extended to the acts of himself (a) and parties claiming under him: it is conceived, that marriage is for this, as it is for other purposes, a valuable consideration, even as in favour of collaterals (b); but, in practice, it is usual for a vendor claiming under a marriage settlement to covenant against the acts of the settlor and his representatives (c).

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To whose acts
his covenants
extend.

It appears to have been formerly held that the Court of Chancery would not compel a vendor to enter into covenants extending back further than the acts of the last owner (d); but where such owner himself acquired the estate otherwise than by purchase for valuable consideration, the "universal and settled practice of conveyancers" (e) is, to make the covenants extend to the acts of all prior owners up to and inclusive of the last purchaser for value: and the Courts would probably at the present day be inclined to sanction such practice by decision

Difference
between
practice of
conveyancers
and rule of
the Court

The owner of an estate sold by order of the Court, or by a trustee to whom he has himself conveyed upon trusts for sale without entering into covenants for title which will run with the land, enters into the same covenants as if he himself were selling (f): but although it is the settled practice of conveyancers to make all the beneficiaries, who take a substantial interest in the proceeds of a sale by trustees, covenant to the extent of that interest, the rule has been held to be different in the case of a sale under the Court, where the trustees are competent to give a valid discharge for the purchase-money (g). In one case,

As to cove-
nants by
owner, on sale
by Court or
by trustees

(a) *Browning v. Wright*, 2 Bos. & P. 13, 22; Sug. 599, 605.

Ves. 238, 236.

(b) *Davenport v. Bishop*, 1 Ph. 698.

(c) Sug. 574. See *Pickett v. Leggon*, 14 Ves. 215, 239; and 2 Bos. & P. 22.

(c) 9 Jarm. Conv. by S. 375.

(f) Sug. 574.

(d) *Lloyd v. Griffith*, 3 Atk. 208; *Wakeman v. Duchess of Rutland*, 3

(g) *Cottrell v. Cottrell*, L. R. 2 Eq. 330, V.-C. S.

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where a sale of a term of years was ordered by the Court, but instead of carrying out the sale as directed, a portion of the fee was, at the request of the owner, a tenant for life, sold by the trustees under a power contained in the settlement, it was held that this was not the case of a sale under the decree of the Court, and that the tenant for life must covenant for title (*h*): but no opinion seems to have been expressed by the Court as to what should be the form or extent of the covenants. These questions upon sales under the decree, or by the direction of the Court, are, according to the present practice, usually precluded by a special condition. And, even in the case of private sales, it may be doubted whether the practice of conveyancers could be altogether enforced; and whether the rules laid down by Lord St. Leonards—that “Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate; and must accordingly covenant for title:” “so even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title”—are not too broadly stated. Suppose that a testator devises an estate to trustees in trust to sell, and with power to give receipts, and to divide the proceeds among his children, all of whom are *sui juris*. Here the beneficiaries, if all wish so to do, may elect that there shall be no sale, but to take the land as real estate. Any of the beneficiaries may, however, require the trustees to proceed to a sale, even against the wishes of their co-beneficiaries. Admitting that those who agree to a sale and join in the contract are bound to concur in the conveyance, and to covenant for title to the extent of their interests, it does not occur to the writer that there is any mode by which the dissentients can be compelled so to concur and covenant. Nor does he conceive that, if they refuse so to do, their refusal would entitle the purchaser to rescind the contract. If so, the inability of trustees for sale

(*h*) *Earl Poulett v. Hood*, L. R. 5 Eq. 115.

to procure the concurrence of all the beneficiaries amounts, in reality, to a defect in title.

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It appears to be the general notion that landowners agreeing to sell land to railway and other similar companies must enter into the usual covenants for title: the liability can hardly be questioned in respect of land which the company has no power to take compulsorily; such as land required for extraordinary purposes (*i*), or in respect of land taken under an ordinary agreement with the owner; but as respects land which the company has power to take compulsorily, the landowner's contract, although apparently voluntary, is scarcely so in fact; and his liability to enter into covenants may be considered doubtful in principle, and not supported by any satisfactory authority; for in "*Re the London Bridge Acts*" (*k*), there was the important fact—although not noticed in the judgment—of the enabling Act having been obtained by the vendors pursuant to an agreement with the purchaser: it is, however, believed to be the general practice for such owners to covenant; and the practice would probably, if necessary, be supported by decision. As respects landowners who have entered into no agreement, but as against whom the entire proceedings of the company have been compulsory, it is conceived that they are not bound, and do not in ordinary practice consent, to enter into any covenant (*l*); but as the interests of all parties are bound by the statutory conveyance, the value of covenants for title is extremely small (*m*).

As to land-owners' covenants on sale to railway company

It was decided by Shadwell, V.-C., that the first and second tenants for life of a settled estate, selling under a private Act of Parliament which they themselves, pursuant to an agreement with the purchaser, had obtained for the purpose, were bound to enter into the usual covenants for title; the Court assuming that upon a sale under a power

Liability of tenants for life to covenant

(*i*) 8 & 9 Vict. c. 18, ss. 12 and 13.

136.

(*k*) Cited *infra*.

(*m*) Day Conv. vol. ii. p. 480.

(*l*) Friend and Ware's Rail Conv.

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with the consent of the tenant for life his obligation so to covenant was a matter of course (n).

To whose acts
 their cove-
 nants should
 extend.

In the above case the statutory vendors were tenants for life under a will, and the covenants for title were extended to acts of their testator: the question whether they were properly so extended, does not appear to have been much considered; and it is submitted, that, although a tenant for life or other owner of a particular estate may be required so to covenant in respect of his own beneficial interest, yet that, as respects the reversion, (in which he has *no* beneficial interest,) his liability under the covenants should be confined to the acts of himself and parties claiming under him: considering the present frequency of such sales the point is one of some practical importance.

In conformity with the above views, the writer of these remarks, on settling a conveyance on behalf of a tenant for life, inserted in one case, after covenants for title extending to the acts and defaults of his ancestors, a clause to the following effect, *viz*, "Provided always, that as respects the reversion or remainder, expectant on the life estate of the said A. B., of and in the hereditaments intended to be hereby assured, and the title to and further assurance of the said hereditaments after his decease, his covenants hereinbefore contained shall not extend to the acts, deeds, or defaults of any person or persons other than and besides himself and his own heirs, and persons claiming or to claim under or in trust for him, them, or any of them:" and this being resisted by the purchaser's counsel, the question was referred to Mr. Christie, who decided in favour of the proposed restriction. A proviso or qualification to this effect is now commonly introduced in practice (o).

Covenants on
 sale, by hus-

Upon a sale, by husband and wife, of the wife's unsettled

(n) *Re London Bridge Acts*, 13 Sim. (o) See *Dav. Conv.* vol. ii, pp. 236, 176, 179. And see *Earl Poulett v. Hood*, L. R., 5 Eq 115. 237, 3rd edit.

freehold or copyhold estate, the husband, since he either does or may receive the purchase-money, covenants for title as upon the sale of his own estate: and if there be any doubt as to the fact of marriage, the woman should herself enter into usual covenants: and it is submitted that a purchaser might require their introduction: and in such a case, and also in a case even where no such doubt exists, it is desirable to make the wife covenant, so as to bind her separate estate, if any. And this, although it probably could not be insisted upon, is commonly required and conceded in modern practice.

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band and
wife, of wife's
estate.

On a sale of leaseholds in lots by way of underleases, the vendor, in addition to the covenant for quiet enjoyment, must covenant with each sublessee to pay the rent in the original lease, and to perform the covenants therein contained so far as the same relate to the residue of the property (*p*).

As to cove-
nants by
vendor of
leaseholds.

An apparently simple point, which must be of common occurrence, but upon which the books of precedents were found to differ, arose in practice; *viz.*, whether, on a sale of leaseholds by a vendor who claimed by purchase, he was bound to covenant generally that the covenants in the lease had been performed up to the time of completion, or whether words should be introduced limiting his liability to breaches of covenant which might have occurred during his own period of ownership. The point being referred by both sides to the writer, he considered that the covenant was in effect merely a covenant for title, and therefore fell within the ordinary rule, and must be restricted as contended for, on behalf of the vendor; and this opinion, although at first questioned, was upon consideration, assented to by eminent conveyancers. And although upon the sale of leaseholds by a vendor who claims by purchase, a covenant that the lease is valid is usually introduced, it is now well settled that the covenant is qualified, extending only to his own acts and

Whether
bound to
covenant
generally.

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omissions and those of any testator or intestate through whom he claims (q).

As to limiting the liability of several covenantors to their respective shares of the purchase-money.

It has been a common practice in cases where tenants in common, or other persons having partial interests in an estate, concur in the conveyance and in the covenants for title, to limit the liability of each covenantor to the amount of his share in the purchase-money. But the correctness of this practice, which seems to have been founded on the notion that the amount of the purchase-money was the measure of damages in case of eviction (r), appears to be open to question.

As to covenants by vendors who are not beneficial owners.

As a general rule, fiduciary vendors only covenant that they have done no act to prevent their selling, or to encumber the property (s); a covenant for further assurance would seem to be a reasonable addition, and is often attempted to be introduced: but it was decided in *Worley v. Frampton* (t), that trustees cannot, as defendants, be compelled to enter into it: even although they were not themselves the contracting parties, but represented the original vendor, who would himself have been bound to enter into such a covenant. The Court, however, raised but abstained from deciding the question whether as plaintiffs they could have procured relief except on the terms of entering into the covenant. It has been held, that the heir-at-law and assignees in bankruptcy of an intended lessor are bound, to the extent of their interests in the property, to enter into special covenants which the intended lessor had contracted to enter into (u); and the decision would apparently apply to the case of an agreement for sale and for special covenants by the vendor. So it has been held by Shadwell, V.-C., and

(q) See *Dav. Conv.*, vol. ii. p. 201.
3rd edit.

(r) *Vide* *supra*, Ch. XIV. s. 5.

(s) 11 *Ven.* 345; *Staines v. Morris*,
1 *V. & B.* 8; *Onslow v. Lord Londes-*
borough, 10 *Ha.* 74.

(t) 5 *Ha.* 560; see *Copper*

Miners' Co. v. Beach, 13 *Beav.* 478;
Hodges v. Blagrove, 18 *Beav.* 404;
and see and consider *Hare v. Burges*,
4 *K. & Jo.* 45, 57.

(u) *Page v. Broom*, 3 *Beav.* 26. As
to making the bankrupt a party, *vide*
supra, p. 513.

by Wood, V.-C., that the executors of a party who has agreed to take a lease, may, if they admit assets, be compelled to enter into the lessee's covenants, so qualified as to restrict their liability to that which they would have incurred had the lease, with corresponding covenants, been executed by their testator (*x*).

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These decisions are perhaps difficult to be reconciled with that in *Worley v. Frampton*; and seem to consist better with the general principle of Equity, that persons who agree to stand in the place of another, represent his liabilities as well as his rights. They also suggest whether the personal representatives of a deceased vendor or purchaser might not be required to join in the conveyance, and, to the extent of the assets, to enter into special covenants which the deceased had agreed to enter into.

In one case where there was a lease for lives, with a covenant for renewal on the death of a *cestui que vie* at the same rent and subject to the same covenants, "including this present covenant," it was held that this gave the lessee a perpetual right of renewal; and although, in effect, the reversioner became a trustee for the lessee, yet the rule laid down in *The Copper Miners' Co. v. Beach* that the Court will not under a decree for specific performance compel parties, who are trustees, to enter into covenants into which under ordinary circumstances they would not be called upon to enter, had no application to a case where the person in whom the reversion is vested is entitled to the beneficial interest (*y*). The decision in this case was rested on the ground that the reversioner was the beneficial owner; but it is conceived that where a lessor enters into a covenant for perpetual renewal, and the reversion afterwards becomes vested in a mere trustee, the latter on granting a renewal may properly be required to enter into a similar covenant: of course so

Observations
on *Hare v. Burges*.

(*x*) *Phillips v. Everard*, 5 Sim. 102; K. & Jo. 45, 57.
and *Stephens v. Hotham*, 4 K. & J. (y) *Hare v. Burges*, 4 K. & Jo. 45,
571. And see *Hare v. Burges*, 4 57. See and consider this case.

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framed as to bind the estate, but not so as to render himself personally liable except in respect of his own acts.

**Incumbrancer
releasing.**

An incumbrancer who releases the estate, whether voluntarily or in consideration of payment, only covenants that he has done no act to incumber.

**Mortgagor
joining in a
sale by
mortgagee.**

Where a mortgagee sells under his power of sale, and the mortgagor concurs, the latter enters into the ordinary vendor's covenants for title, which supersede the absolute covenants contained in the mortgage deed.

**Bankrupt
joining in sale
by his
assignee.**

When a bankrupt concurs with his trustee in selling, he generally enters into covenants for title as an ordinary vendor, but if he refuses, he cannot be compelled to do so (2).

**Tenants in
common, and
joint tenants.**

Covenants for title by tenants in common upon a sale are limited to their several shares; joint tenants are sometimes made to covenant both jointly and severally; but it seems more reasonable to restrict their covenants to the extent of their individual interests. A mortgagee may require his mortgagors, whether they are joint tenants or tenants in common, to enter into joint and several covenants for title.

**Crown gives
no covenants.**

A purchaser from the Crown can require no covenants for title (a).

**Covenants by
parties inter-
ested in pur-
chase-money.**

Upon a sale by trustees under a will, for general purposes, or by order of the Court, the purchaser is not entitled to any covenant for title but that against incumbrances; except, perhaps (in the case of a will), where the purposes to which the purchase-money is primarily applicable have since been satisfied, so that the substantial owners are in fact ascertainable (b); and they have concurred in or confirmed the contract. In practice, however, it is usual in every case

(a) As to the power of the Court of Bankruptcy to order the bankrupt to join in the conveyance, *vide supra*, p. 518.

(a) Sug. 575.

(b) See *Lloyd v. Griffith*, 3 Atk. 268; *Wabeman v. Duchess of Rutland*, 3 Ves. 504; 8 Bro. P. C. 145.

to insert covenants by the parties who are beneficially entitled in any considerable amount to the residue of the purchase-money (c); but according to a modern decision, this cannot be insisted on where the sale is ordered by the Court, and the trustees are competent to give a discharge for the purchase-money (d): and the soundness of the general practice seems open to question.

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Any covenant intended to provide for a defect in title which appears on the face of the conveyance, should be so expressed (e). If the defect can be kept off the face of the conveyance (which is generally the case) the covenant should be entered into by a separate instrument, which should refer to the defect; or there should be a contemporaneous agreement signed by the covenantor admitting the existence of the defect, and stating that the same is intended to be included in the covenant (f). Where the defect consists in the existence of incumbrances, it will be a matter for consideration whether a mere covenant to indemnify can be relied on, without a covenant to pay or procure payment of the charge: this question particularly applies to interest upon charges, and to annuities or other periodical payments:—under a mere covenant to indemnify, the purchaser would have no remedy until actual disturbance, although the interest or annuity might be running heavily into arrear.

Covenant
against known
defect.

Covenants for
indemnity
against
charges.

Where, upon the sale of an estate, a bond in double the amount of the purchase-money was given by the vendor to the purchaser, as an indemnity against the possible claim of a supposed equitable mortgagee, with a condition that if at the end of a year there should be no action or suit pending whereby the purchaser's title might be prejudiced, or if the vendor should then pay to the purchaser a sum

As to con-
struction of
bonds of
indemnity.

(c) Sug. 574.

(d) *Cottrell v. Cottrell*, L. R. 2 Eq. 330, V.-C. S.; and compare *Earl Poulett v. Hood*, L. R. 5 Eq. 330;

and see *Lewin*, 6th Ed., p. 390.

(e) See *Ogilvie v. Fofjamba*, 3 Mer. 53; Butler's note to Co. Litt. 384, a.

(f) *Vide infra*, Ch. XIV. a. 5.

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equal in amount to the purchase-money with interest, the bond should be void, the equitable mortgage having been established in a suit commenced within the year, and the vendor having failed to pay the stipulated amount by the time appointed, and his subsequent offer to do so having been rejected, it was held that the purchaser, who had paid off the incumbrancer to an amount equal to that secured by the bond, was entitled to retain the estate, and to enforce the bond to the full extent (*g*). It was considered doubtful whether the liability upon the bond was intended to be limited to the purchase-money and interest, and the Court declined to interfere with a legal right upon the assertion of a merely doubtful equity.

Covenant for
production of
deeds.

A covenant for production of title deeds, if it extend to documents not noticed in the conveyance, should, as a general rule, be entered into by a separate deed: the question, however, to be considered is, whether any document covenanted to be produced is of such a character as to make it desirable that it should, so soon as practicable, be taken off the title (*h*).

Purchaser's
right to.

As a general rule, a purchaser is entitled to a valid covenant for the production, and probably for the right to take copies (*i*), of such documents of title as are not delivered over to him (*k*): commencing with such as are necessary to show a marketable title (*l*), and excepting such copies of court roll and inrolled deeds (if inrolled under any Act which makes the inrolled evidence) as are not in the possession or power of the vendor (*m*). The want of such a covenant was, until recently, a ground of objection to the

(*g*) *Osborne v. Eales*, 12 W. R. 654; also 13 & 14 Vict. c. 97.
a case in the Privy Council.

(*h*) A separate deed of covenant is chargeable with the same duty as the conveyance or mortgage, if not exceeding ten shillings, and in other cases with a duty of ten shillings; 33 & 34 Vict. c. 97, sched.; and see

(*i*) Sug. 452.

(*k*) *Barclay v. Raine*, 1 Sim. & St. 449.

(*l*) *Dare v. Tucker*, 6 Ves. 460; *Cooper v. Emery*, 1 Ph. 388.

(*m*) *S. C.*

title; but now, under the 37 & 38 Vict. c. 78, if the vendor is unable to furnish such a covenant, the purchaser must, subject to the stipulations of his contract, be satisfied with merely his equitable right to their production (*n*).

The covenant upon a sale of freeholds held of a manor subject to leases for lives granted by copy of court roll, must extend to the court rolls up to the date of the conveyance (*o*). In the absence of agreement, the purchaser is not bound (*p*) (except upon a sale of a bankrupt's estate (*q*),) to assent to the introduction of the ordinary proviso for determining the vendor's liability upon his selling the residue of the property, and procuring, without expense to the parties entitled to the benefit of the covenant, a substituted covenant to be entered into by the person who will upon such sale become the holder of the deeds. The proviso when inserted should provide for the actual delivery of the substituted deed of covenant to the purchaser or his representatives; and when properly framed is rather beneficial than otherwise to the purchaser, as it enables him to trace the devolution of the title deeds (*r*).

Proviso for determining the liability.

On a sale by fiduciary vendors, who retain the title deeds, it is usual to insert a proviso for a substituted covenant, or one expressly limiting their liability under the covenant to the time during which the deeds are in their actual custody (*s*). The insertion of such a proviso or qualified covenant should always be stipulated for on their behalf.

On sale by fiduciary vendors.

The right to a covenant for production is, however, as a general rule, confined to those documents which affirmatively

To what documents it extends.

(*n*) See sect. 2. It is conceived that this section only applies to a case of absolute inability, not to a case of mere difficulty or inconvenience.

(*o*) *Earl Poulett v. Hood*, L. R. 5 Eq. 380.

(*p*) Sug. 452.

(*q*) *Ex parte Stuart*, 2 Rose, 215, L. C., where the Court stated, gene-

rally, that the assignees' covenant should be confined to the time of their continuance as assignees.

(*r*) See *Dav. Conv.* vol. ii. p. 542, 3rd edit.

(*s*) For form of such a qualified covenant, see *Dav. Conv.* vol. ii. p. 544, 3rd edit.

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evidence the vendor's title (t), and does not extend to those not in his possession, and which are required to negative mere possibilities. It appears, in fact, to have been decided by Shadwell, V.-C. (u), that a purchaser from an heir-at-law, whose ancestor left a will not affecting the property, can require no covenant for its production: this decision seems, however, to conflict in principle with that in a case (x) where a purchaser from an heir under similar circumstances, was, upon selling again, held bound to produce the will, if in existence, for the inspection of the sub-purchasers; and Lord St. Leonards seems to think that where the negative evidence is necessary for the satisfaction of the purchaser, and is *in the custody of the seller*, there is no sufficient reason why it should not be covenanted to be produced (y): and this seems to be the sounder view.

As to covenants for production running with the land.

In order that the covenants for production may run with the land in respect of which the deeds are retained, it is necessary that the covenantor should be seised of the legal estate in such land (z): this, however, is a point not often attended to; and if a purchaser has a right to insist upon it, such right would seem to involve the additional right of requiring the title to such other land: a purchaser, it is conceived, could not be advised to press the point: and it is generally disregarded in practice. Where the covenant for production does not run with the land, the title will not be considered unmarketable, and production may be enforced in Equity (a).

With whom vendor's covenants should be entered into.

The vendor's covenants, if the estate be freehold, should be entered into with the grantee, lessee, or feoffee to uses (if any). If the estate be copyhold, it appears to be the

(t) Including of course deeds of covenant for production entered into by prior vendor; Sug. 452.

(u) *Cooper v. Emery*, cited in Haynes on Conv. 373, 3rd ed.

(x) *Stevens v. Guppy*, 2 Sim. & St. 439.

(y) Sug. 452.

(z) Sug. 453; even then the result is not free from doubt; vide *infra*, Ch. XIV.

(a) See further as to this, Sug. 453, note; and see now 37 & 38 Vict. c. 78, sect. 2.

preferable practice, instead of taking a covenant to surrender with covenants for title and production in the same deed, to let the surrender precede the execution of the deed containing the covenant for title and production: as, if the former course be adopted, it is not clear that the benefit of the covenants will run with the land (b). This, however, is often inconvenient, and therefore disregarded. Where the property is conveyed to joint tenants, the covenants should be with them jointly.

On the other hand, the vendor may, in certain cases, require covenants on his own account: for it may be laid down, as a general rule, that whenever he is personally subject to liabilities, either in respect of the estate, or for the performance of which the estate stands as a security, the purchaser, taking the estate, must undertake the liabilities, and covenant to indemnify the vendor against them.

Purchaser's
covenants
with vendor.

For instance, on the sale of an equity of redemption the purchaser, even in the absence of express stipulation, incurs a liability to pay the mortgage debt and future interest (c): and may, it is conceived, be required to covenant so to do.

On purchase
of equity of
redemption,

So, on the sale of a reversion, the purchaser, it is conceived (d), must covenant to pay the succession duty, unless compounded for (e) at the time of the sale.

or a reversion,

So, on the sale of leaseholds, either by the original lessee or by an assignee who has entered into a similar covenant with a prior owner, the purchaser must covenant (f) to pay the rent and perform the covenants contained in the lease,

or leaseholds.

(b) Dav. Conv. vol. i. pp. 111, 112; 9 Jarm. Conv. by S. 188.

(c) *Waring v. Ward*, 7 Ves. 332, 337.

(d) *Vide infra*, Ch. XIII., s. 2.

(e) See 16 & 17 Vict. c. 51, ss. 41, 44.

(f) The usual words in the habendum, "subject to the payment of the rent and performance of the covenants," have been held not to be equivalent to such a covenant by the assignee, *Wolveridge v. Stebard*, 1 Cro. & M. 644.

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and to indemnify the vendor against the same (g): so, on a sale of leaseholds in lots by way of underlease, each purchaser must covenant to perform the covenants contained in the original lease so far as the same relate to the property comprised in his own underlease (h).

But no indemnity from purchaser on sale of bankrupt's leaseholds.

Upon the sale of a bankrupt's leasehold by his assignees under the old law, no indemnity was needed, either by the assignees or the bankrupt: for the assignees were under no liability after they had assigned; and the bankrupt was by the Statute released from liability upon the assignees taking to the lease (i). But it has been said that if the bankrupt were assignee of the lease, and not lessee, the Statute did not discharge him from his obligation to indemnify the prior owner (k).

Under the Act of 1869.

Under the present law the bankrupt will, it is conceived, continue liable on his covenants in the lease, until his trustee has either sold or taken to the lease by some act of intentional acceptance, or has disclaimed or lost his right to disclaim (l). The exercise of acts of ownership by the trustee, as entering into possession or attempting to sell, is no longer to be deemed an acceptance of the lease, so as to destroy the right to disclaim within the time limited by the Act. The effect of disclaimer is not to re-vest the property in the bankrupt, but to vest it in the person entitled on the determination of his estate and interest: and any injury occasioned by the disclaimer is to be deemed a debt proveable under the bankruptcy (m).

On sale of leaseholds by executors, &c

Where an executor or administrator has satisfied all the

(g) *Pember v. Mathers*, 1 Bro. C. C. 52, 54; *Staines v. Morris*, 1 V. & B. 8; and see *Closs v. Wilberforce*, 1 Beav. 112; *Cochrane v. Robinson*, 11 Sim. 378; and see *Morley v. Clavering*, 7 Jur. N. S. 904. As to what can be recovered in an action on the covenant, see *Smith v. Howell*, 6 Exch. 750.

(h) *Browne v. Paul*, 26 L. T. 232, V.-C. K.; 2 Jur. N. S. 317.

(i) See *Wilkins v. Fry*, 1 Mer 244, 268, and Bankrupt L. C. Act, 1849, s. 145.

(k) See *Maples v. Pepper*, 18 C. B. 177; *sed quare*.

(l) As to the leave of the court being necessary to such a disclaimer, *In re Wilson*, L. R. 13 Eq. 186; *Ex parte Lovering*, L. R. 9 Ch. Ap. 586; and *vide supra*, p. 84.

(m) See 32 & 33 Vict. c. 71, s. 23.

liabilities of a lease granted or assigned to his testator or intestate, and has assigned the lease to a purchaser, he may now safely distribute the residuary estate, and, after such assignment, is no longer personally liable in respect of any subsequent claim under the lease (n); but the lessor may follow the assets into the hands of the persons among whom they have been distributed. On a sale by executors or administrators it is still usual to indemnify them, as well as the estate of the deceased, from all future liability in respect of the rent and covenants of the lease.

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Independently of contract, the legal or equitable assignee of a lease is, as respects the time only during which he is in possession, bound to indemnify the lessee against liabilities under the lease (o); and it has been held that where the equitable assignee has actually parted with the possession he is no longer liable to be sued by the landlord for breaches of covenant, or non-payment of rent, during the period of his possession (p).

Indemnity by
a signee of
lease,

The rule that a purchaser must undertake his vendor's liabilities would, it is conceived, apply to the sale of freehold land subject to quit-rent which the vendor has entered into a personal liability to pay. So, where in *Moxhay v. Indermick* (q), a vendor of freeholds had, on his own purchase, covenanted to observe the covenants entered into by a former owner, which prohibited building upon the land, it was held that a purchaser who bought with notice (r) of the restriction, and filed a bill for specific performance must elect, either to rescind the contract, or to enter into a similar covenant with the vendor: and a like decision was pronounced in a later case of *Lukey v. Higgs* (s), where the bill

or freeholds
subject to
quit-rent, or
covenants for
or upon which
vendor is
liable.

(n) 22 & 23 Vict. c. 35, s. 27; and see sect. 28.

(o) *Burnett v. Lynch*, 5 B. & C. 589, 602; *Olose v. Wilberforce*, 1 Beav. 112; *Sanders v. Benson*, 4 Beav. 350; *Moore v. Greg*, 2 Ph. 717; *Rowley v. Adams*, 4 Myl. & Cr. 534; and see

Beale v. Sanders, 3 Bing N. C. 850.

(p) *Cox v. Bishop*, 8 De G. M. & G. 815; see and consider *Wright v. Pitt*, L. R. 12 Eq. 408.

(q) 1 De G. & S. 708.

(r) From the printed particulars.

(s) 1 Jur N. S. 200, V.-C. K.

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was filed by the vendor, but the purchaser had bought without notice of the original covenant.

Moxhay v. Inderwick and Lukey v. Higgs considered.

Moxhay v. Inderwick was a suit by a purchaser, who bought with full notice of the original covenant, but had not expressly agreed to enter into a special covenant with the vendor. The Court, in giving judgment, reserved the question as to what the rights of the parties would have been in respect to the insertion of the special covenant had the vendor been the party insisting on specific performance: it merely decided upon the case as it then stood, that the purchaser claiming the estate must enter into the covenant. In *Lukey v. Higgs*, a vendor's suit, the purchaser bought without notice of the original covenant: and the Court, having determined that he had waived this objection to the title only upon condition that he should not be required to enter into any special covenant, necessarily also held that, as this condition was resisted, he had a right to elect either to covenant or to rescind the contract. But the Court also is represented to have used expressions intimating that *Moxhay v. Inderwick* is an authority for holding that a vendor as plaintiff cannot insist on the insertion of such a covenant, even as against a purchaser who buys with notice. This point seems to be, in fact, untouched by *Moxhay v. Inderwick*, as reported; and the conclusion pointed at by the Court in *Lukey v. Higgs*, seems open to considerable doubt. A. and B. enter into a contract for sale and purchase which clearly discloses the existence of the original liability: it is conceded that upon a bill filed by B., the Court will hold that the proper instrument for carrying out this contract is a conveyance containing a certain special covenant by B,—the propriety of inserting such covenant depending not upon any matter *dehors* the contract, but upon matter disclosed by the very contract itself. Upon what principle can it be held that the terms of the instrument which is intended to define the rights and liabilities of the parties, as arising under the contract, ought to depend upon the accident of its being the party rather than the other who seeks to enforce

its performance? Reasons may sometimes be supposed to exist why a contract between A. and B. should be enforced at the suit of A., but not of B.; but it is difficult to find any satisfactory reason for holding, that the contract—admitting that it is to be enforced—is to mean one thing if enforced at the suit of A., and something else if enforced at the suit of B.

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Upon similar principles, when the vendor has covenanted with a former purchaser for the production of the deeds, a purchaser of the residue of the estate, if he take the deeds, must covenant for their production to the first purchaser (t), or indemnify the vendor against his liability to produce them.

For production of deeds.

Where land is conveyed to releasees to uses in strict settlement, they are not, under a condition that the purchasers shall take the deeds and “enter into or procure to be entered into a proper and sufficient covenant for their production,” bound personally to enter into such a covenant; but it is sufficient if they procure the tenant for life so to covenant (u).

On sale by trustees of settled estates.

Where the contract for sale provided that the conveyance should be made subject to certain specified stipulations as to the mode of building upon the land, and also to “a covenant on the part of the purchaser, his heirs and assigns, and proper provisions for securing the due observance and performance thereof,” it was held that the conveyance should contain, not only the covenant, but also a power for the vendor or his representatives to enter and remove any buildings erected in breach of such covenant, and to retain possession until payment of the consequent expenses; but that he was not entitled to have a term for years, or a rent-charge, limited to a trustee by way of security for the performance of the covenant (x).

Agreement against using land in specified manner—performance of, how to be secured in conveyance.

(t) *Vide infra*, Ch. XIII. s. 7.

(u) *Onslow v. Lord Londesborough*, 10 Ha. 67.

(x) *Ex parte Ralph*, 1 De G. 219; see the form given, p. 228. It seems to make no provision for interest.

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Vendor of minerals entitled to power to enter and ascertain state of workings.

Under an agreement to purchase the minerals under a given surface, the price to be payable by instalments, and the payments to be accelerated if more than a given quantity of minerals be gotten from time to time, the vendor is entitled to a covenant in the conveyance, reserving to him a right of entry for the purpose of ascertaining the state of the workings (y).

Purchaser in consideration of annuity, covenants for payment.

Under an agreement to purchase land in consideration of life annuity, "to be charged on the land," the vendor is entitled to, not only the charge, but also the purchaser's covenant for payment (z).

Purchaser, when bound in Equity by covenants, although he do not execute.

And a purchaser who accepts the benefit of the conveyance, will be bound in Equity by the covenants on his part therein contained, although he do not execute it (a): but provisions restrictive of a purchaser's *prima facie* rights will not be strained against him (b).

The word "give" or "grant" not to imply a covenant.

Lastly, we may remark, that under the 8 & 9 Vict. c. 106, s. 4, the word "give" or the word "grant" in any deed executed after the 1st October, 1845, is not to imply any covenant at Law, in respect of any tenements or hereditaments, except so far as it may do so by force of any act of parliament (c). The object of this enactment appears to have been to prevent any *general* warranty of title from arising by the use of the words "give" and "grant;" and it probably would not be held to interfere with the rule of Law that any words of assurance operate as a covenant for quiet enjoyment of the interest expressed to be assured as against the future acts of the party making the assurance (d). Under the 6 Anne, c. 35, ss. 30 and 34, and 8 Geo. II. c. 6, s. 35, the words

(y) *Blakesley v. Whieldon*, 1 Ha. 176.

(z) *Bower v. Cooper*, 2 Ha. 408; *Remington v. Deverall*, 2 Anst. 550; *Dixon v. Gayfer*, 17 Beav. 421, 21 Beav. 118; 1 De G. & Jo. 655.

(a) *Willson v. Leonard*, 3 Beav. 373.

(b) *Warden, &c. of Dover v. South Eastern Railway Co.*, 9 Ha. 489.

(c) But it may amount to a covenant to stand seised; *Doe v. Prince*, 15 Jur. 632, C. B.; 20 L. J. 223. As to such words not amounting to a personal covenant when used in the grant of a rent-charge, see *Monypenny v. Monypenny*, 4 Jur. N. S. 873.

(d) See, as to the word "assign," *Edillon v. Senate*, 13 East, 74.

"grant, bargain and sell" in bargains and sales of hereditaments in Yorkshire, inrolled according to those Acts, have the effect of the usual covenants for title in favour of a purchaser (e), and this of course falls within the exception in the 8 & 9 Vict. c. 106. So in a conveyance under the Lands Clauses Consolidation Act, 1845 (f), by the promoters of the undertaking, the word "grant" is to operate as covenants for title, unless limited by express words contained in the conveyance; so, in a conveyance by a public company under the Joint Stock Companies Act (g), the ordinary covenants for title are to be implied, unless such implication is expressly negatived.

The word "demise" in a lease for years still operates as an implied covenant for title, but this implication is negatived if an express covenant is inserted. If the lease is by parol, a covenant for quiet enjoyment, but not a covenant for title, is implied.

The word
"demise"
implies a cove-
nant for title.

Where a deed contained a recital of an agreement to secure an annuity, and the grantor, after granting the annuity, covenanted that the grantee should have the usual powers of entry and distress, and then granted and demised the estate charged therewith for a term of years upon trusts for securing the annuity, but did not expressly covenant for its payment, it was held by V.-C. Wood, and Barons Bramwell and Watson, who assisted him (h), that neither the recital nor the grant and power of distress, whether taken singly or collectively, amounted to a covenant, so as to create a debt payable out of the personal assets of the grantor; but this decision was reversed by the Court of Appeal in Chancery, and the decision of the Appellate Court was affirmed by the House of Lords, *dissentiente* Lord St. Leonards (i). So a mere recital, though it does not necessarily imply a covenant, may be sufficient to raise one, if such is the clear intention of the parties (k); so,

Covenants
implied,
when.

(e) See Burt. Comp. 593.

(f) 8 & 9 Vict. c. 18, s. 132.

(g) 19 & 20 Vict. c. 47, s. 46.

(h) 4 K. & Jo. 174.

(i) *Monypenny v. Monypenny*, 3 Do G. & Jo. 572; 9 H. L. Ca. 114, 135.

(k) See *Iven v. Ellice*, 3 Drow. 25, 36, and cases there cited.

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on the assignment of a debt, there is an implied covenant by the assignee that he will not release or compound it (1).

Section 6.

(6) *As to the draft and engrossment.*

As to the draft
and engross-
ment.

The draft having been settled, a fair copy of it should be submitted to the vendor's advisers for perusal; and, if practicable, within a reasonable time prior to the date fixed for completion. The date of delivery is sometimes fixed by the conditions.

As to the
perusal of
drafts.

It may possibly be useful to make some remarks as to what are, in the opinion of the writer, the duties of counsel (and the observations apply equally to solicitors) in perusing a draft drawn or settled by another practitioner; a point upon which, according to his observation, much misapprehension prevails among many members of the profession. These duties are, merely and exclusively to protect the interests of the client on whose behalf such counsel is consulted. He is, therefore, not justified in altering the structure or language of a draft merely because such structure or language is not such as he would himself have adopted, or approved of, if he had been advising on the other side. When such a course is adopted in respect to a draft settled by another practitioner of equal or greater standing or reputation in the profession, the proceeding is an impertinence: and when adopted in respect of a draft settled by a junior, it may frequently be, not merely an impertinence, but also a cruelty; as amounting to an implied professional censure by one whose censure may be prejudicial. Sometimes, of course, in the case of a very obvious slip, it may be allowable and proper to direct attention to it; but even then it is better, as a general rule, to do so by a marginal note; and not to undertake officiously to alter another man's draft upon points with which the critic's own client has no concern. And, on the other hand, when the above rules have been violated by an opponent, it is usually better to allow his alterations to pass—with or

without marginal comment—if they are not really prejudicial, but are merely officious, rather than to insist upon the draft being restored to its original shape. Doubtless it is very annoying to be seemingly instructed in conveyancing by another practitioner; but where such discipline can only be rejected at the client's expense, it should, as a general rule, be submitted to; unless a regard to the client's own interests calls for its rejection, or unless it involves alterations seriously inconsistent with the ordinary rules of conveyancing.

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When the draft has been approved, any alteration made in it should be communicated to the other party before engrossment (*iii*). Where the alterations merely consist in omissions of passages introduced by such other party, or can otherwise be easily pointed out, it is submitted, that the opposite solicitor (who must be presumed to have retained a copy of the draft) would not be entitled to a general reperusal: this is a question which sometimes arises in those exceptive cases where the purchaser has to pay the vendor's expenses. The draft, it may be remarked, belongs to the purchaser, not to his solicitor (*ii*).

Alterations in
draft should
be communi-
cated.

The engrossment is made by and at the expense of the purchaser: the ordinary practice as to the position of the indorsed receipt and attestation clauses, should be adhered to; as a departure therefrom may give rise to questions with future purchasers (*o*). The practice, now frequently adopted, of engrossing a deed bookways, has much to recommend it; and it is a convenient plan to make up with the engrossment some blank pages at the end, for the purpose of containing supplemental instruments, which may refer to the principal deed in the same way, *mutatis mutandis*, as if they were endorsed on it.

Engross-
ment—

The engrossment is the property of the purchaser: when

belongs to
purchaser.

(m) 1 V. & B. 15.

178.

(n) *Ex parte Horsfull*, 7 B. & C.

(o) *Kennedy v. Green*, 3 M. & K.

528; *Doe v. Seaton*, 2 Ad. & E. 171, 699.

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executed the vendor has a lien upon it for unpaid purchase-money (*p*), but his solicitor has no lien on it for costs (*q*).

Executed, and then contract rescinded.

Where the engrossment was executed by the vendors, but the purchase went off in consequence of other material parties refusing to execute, and the vendors made no claim to it as a deed, the purchaser was held entitled at Law to recover it from their solicitor, they being allowed to cancel it (*r*): this decision, however, as observed by Lord St. Leonards, "depended upon the instrument having been imperfectly executed, and upon the sellers not interposing to claim any interest in it" (*s*): and where the deed has been executed so as to vest the legal estate in the purchaser, there would seem to be a difficulty in holding that he could claim to retain it upon the contract going off, even although he were willing to execute a reconveyance.

What is good delivery of a deed.

No particular form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing of the seal does not make it a deed; but so soon after sealing as there are acts or words sufficient to show that it is intended by the party to be executed as his deed, presently binding upon him, that is sufficient; and there is no technical necessity for the grantee or his agent to take corporeal possession of the instrument (*t*).

(*p*) Sug. 564.

(*q*) *Ozenham v. Esdaile*, 2 Y. & J. 493; 3 Y. & J. 262. As to deeds handed over by mortgagee to mortgagor's solicitor, in order to effect a

sale, see *Young v. English*, 7 Beav. 10.

(*r*) *Esdaile v. Ozenham*, 3 B. & C. 225.

(*s*) Sug. 564.

(*t*) Per Blackburn, J. See *Xenos v. Wickham*, L. R. 2 E. & Ir. Ap. 296.

The law of fixtures, where the title to them is distinct from the title to the property in the soil or buildings to which they are annexed, is not within the scope of this treatise, but in the present state of the authorities as respects the necessity of registration under the Bills of Sales' Act, the following short review of the law as it now stands upon the subject may not be considered out of place.

As a general rule, fixtures of every description, including trade fixtures

and personal chattels, incident to the freehold, (*Mather v. Fraser*, 2 K. & J. 536, 559), on being annexed to the freehold acquire a descendible character; (*Fisher v. Dixon*, 12 Cl. & F. 312), and pass by a conveyance of the land, whether they are specified or not; and the enumeration of specific articles does not necessarily raise a presumption that others were not intended to pass (*Mather v. Fraser*, *ubi supra*). Nor is there any distinction in this respect between a mortgage, whether

created by a deed or a mere equitable deposit, and an absolute conveyance (*Mitchman v. Walton*, 4 M. & W. 409, 410. *Ex parte Astbury*, L. R. 4 Ch. App. 630).

Previously to the Bills of Sales' Act (17 & 18 Vict., c. 36), the sole test of the validity, as against creditors, of a bill of sale of personal chattels was whether it was fraudulent and void under the 13 Eliz., c. 5, or voidable under the reputed ownership clauses of the Bankruptcy Acts. Where, as in the case of an absolute assignment, there was an immediate delivery of the chattels, the property passed at once to the purchaser; and although on fraud being clearly proved, the sale might be avoided under 13 Eliz., c. 5, there was no *prima facie* presumption of fraud (as in *Twyn's* case, 1 Smith's L. C. 1): but where, as generally happened on a mortgage, the mortgagor retained possession of the chattels, the mortgagee was exposed to the risk of having the transaction impeached under the 13 Eliz., c. 5, and (if the mortgagor being a trader became bankrupt), under the reputed ownership clauses of the Bankruptcy Acts, 12 & 13 Vic., c. 106, sec. 125, 32 & 33 Vic., c. 71, sec. 14, sub sect. 5.

To these risks the Bills of Sales' Act added* that of the avoidance of the security as against the trustee in bankruptcy and the execution creditor of the mortgagor (but not as against a puisne incumbrancer, *Meux v. Jacobs*, H. L., 25 March, 1875), if the Bill of Sale is not, within twenty-one days after execution, registered in manner prescribed by the Act; which registration must be renewed every five years (29 & 30 Vict., c. 96, s. 4).

It had been repeatedly held that a mortgage of land and buildings with trade or tenant fixtures annexed, does not require registration under the Act; although, as between landlord and tenant, such fixtures would be removable by the latter at the end of his

tenancy (*Mather v. Fraser*, 2 K. & J. 536; *Clintie v. Wood*, a case in the Exchequer Chamber, L. R. 4, Exch. 328; *Longbottom v. Berry*, L. R. 5, Q. B. 123; *Holland v. Hodgson*, L. R. 7, C. P. 328; *ex parte Astbury*, L. R. 4, Ch. App. 630, a case of equitable mortgage by deposit); nor until quite recently was any distinction either drawn by the Courts of Law or Equity, or recognized in practice, as respects the non-liability to registration, between a mortgage of freeholds or copyholds and a mortgage of leaseholds, comprising trade or tenant's fixtures. Thus in a leading case of *Boyd v. Shorrocks*, L. R. 5, Eq. 73, where a leasehold mill and the machinery, with which the lessee had stocked it, were assigned together by way of mortgage, V.-C. Wood held the machinery passed as fixtures, and that registration of the deed was not necessary (see too *Turner v. Cameron*, L. R. 5, Q. B. 307; *Cullwick v. Swindall*, L. R. 3, Eq. 249). An owner of leaseholds was thus enabled, the same as the owner of freeholds or copyholds, to avail himself of the full value of his property as increased by his fixed plant and machinery, without the publicity of registration and the consequent diminution of his credit. But in the recent case of *Hartrey v. Butlin*, L. R. 8, Q. B. 290, where a lessee for years mortgaged his leasehold factory by way of underlease, and his fixed machinery in it by assignment, the Court of Queen's Bench, following a decision of V.-C. Malins in *Beylie v. Fenwick*, 24 L. J. N. S. 58, and disapproving *Boyd v. Shorrocks*, held that, *quod* the tenant's fixtures, the deed required registration under the Act. In both these cases the fixtures were assigned by a witnessing part of the deed distinct from that which dealt with the land and buildings to which they were attached; but this circumstance does not seem to have been relied on as shewing an intention on the part of the mortgagor to treat them as mere

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personal chattels, and not as fixtures passing with the land. So in a still later case of *ex parte Daglish*, L. R. 8, Ch. App. 1072, where there was a demise and assignment by the same witnessing part of a leasehold cotton-mill with fixed and movable machinery, as to the leaseholds and fixed machinery for a long term of years less a nominal reversion, and as to the movable machinery absolutely, and with power for the mortgagor to sell the fixed and movable machinery either with the mill or separately, it was held that the deed *quoad* the trade fixtures required registration, on the ground that it authorized the mortgagees to deal with them separately from the buildings. On the other hand, in a later case of *ex parte Barclay*, L. R. 9, Ch. App. 576, where there was a mortgage by demise of a leasehold public house and cottages, including all tenant's fixtures, with power for the mortgagee to sell in case of default, it was held that the deed did not require registration, *quod* the tenant's fixtures; inasmuch as, according to that construction which the Court put upon the power of sale, it did not empower the mortgagee to sell the fixtures separately from the buildings. It may be doubted whether the language of the power of sale, in *re Barclay*, justified the construction which the Court put upon it; but assuming the Court to have been right upon the question of construction, it seems to the writer that there was a substantial, although (to use the language of L. J. James) a thin distinction between the case and in *re Daglish*. According, therefore, to the law as interpreted by recent decisions, registration, *quod* tenant's fixtures, whether they be affixed prior or subsequently to the date of the security (*Meux v. Jacobs*, *supra*), is unnecessary upon a mortgage of freeholds, or copyholds, or even of leaseholds, unless it appears, on the face of the instrument, that the mortgagee is, as between himself and

the mortgagor to be at liberty to sever the fixtures: in which case registration is necessary *quod* the tenant's fixtures. These distinctions have not been universally approved of in the profession: and a bill for an Act amending the law upon the subject has been introduced in the present Session of Parliament; but which, should it pass into law in its present shape, seems calculated to add to rather than diminish the existing dissatisfaction: the true remedy for which it is submitted would be to restore the law as it was understood to be before it was disturbed by the recent decisions in *Hootery v. Bullin* and *ex parte Daglish* that is, the Act should be considered to apply only to mortgages of personal chattels, or of fixtures apart from the land or buildings, whether of freehold, copyhold, or leasehold tenure, to which they are annexed.

We may observe that registration under the Act gives no protection against the reputed ownership clauses in the Bankruptcy Act. *Baileger v. Shar*, 29 L. J. Q. B. 73; *Stansfield v. Cubitt*, 2 De G. & J. 222, *re Daniel ex parte Ashby*, 25 L. T. 124, *re Arthur O'Connor*, 27 L. T. 27.

As to the substitution of a fresh bill of sale within the 21 days, so as to avoid the necessity of re-registration, see *Smale v. Burr*, L. R. 8 C. P. 64; *Ramsden v. Lupton*, L. R. 9 Q. B. 17. As to what is a sufficient, and not a mere formal, taking of possession under the Act, see *ex parte Lewis re Henderson*, L. R. 6 Ch. App. 626, and cases there cited. As to the necessity for registering an agreement to give a bill of sale, if relied on as an equitable assignment of the chattels, see *ex parte Mackay*, L. R. 8 Ch. App. 643, 648; *ex parte Conning*, L. R. 16 Eq. 414: see, however, *Ex parte Homan*, L. R. 12 Eq. 593. The liquidation of a public company is not bankruptcy within the meaning of the Act. *In re Marine Mansions Company*, L. R. 4 Eq. 601.

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All the more important decisions upon the construction of the Acts and Rules down to the end of the Michaelmas Sittings, 1877, will, I believe, be found noticed with some of later date.

Many minor typographical changes have been made in this edition, which will, I hope, be found to increase its convenience in use. Italic type has been used throughout the book to indicate repealed matter.

All the Rules of Court, both those in the Schedule and those of later date, have been issued without marginal notes. I have ventured to add short marginal notes to them.

I cannot too strongly express my obligations to Mr. Biddle, of the Master of the Rolls' Chambers, for his assistance in the preparation of this edition. The whole book has been revised by him; and I have throughout received from him very valuable suggestions. He has also relieved me of much labour by revising and annotating the forms annexed to the rules, and in many other ways.

I wish particularly to notice the Table of Cases, which Mr. Biddle has prepared. The course ordinarily adopted throughout the book is to cite each case with a reference to only one report of it, except where there appeared special reason for referring to another. The Law Reports are commonly cited where the case has appeared in that series. To have mentioned in the body of the work every report of each case would have been a cumbersome and I think an inconvenient plan. On the other hand, many practitioners use series of reports other than those commonly cited in this book. To meet the difficulty thus arising, the Table of Cases gives a reference to all the reports of each case cited.

The reconstruction of the Index, rendered necessary by the large amount of new matter, has been kindly undertaken by my learned friend, Mr. Harry Greenwood, of the Chancery Bar.

The Introduction which appeared in the former edition has been omitted in this. That Introduction was intended to assist the reader to become acquainted with a system then wholly new. The system is no longer new or unknown, so that there is not the same necessity for such an introduction. The omission contributes to secure an object which I have throughout had in view, the keeping down the bulk of the book.

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